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United States

Circuit Court of Appeals

For the Ninth Circuit.

BUDGET FINANCE PLAN, INC., a Corporation,
Appellant,

VS.

JOHN O. ENGLAND, etc., Trustee of Estate of
Buddie Jerome Hayner, bankrupt,
Appellee.

Transcript of Record

**Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division**

FILED

MAR 26 1948

PAUL P. O'BRIEN. CLERK
PAUL P O'BRIEN. CLERK

No.11856

United States
Circuit Court of Appeals
For the Ninth Circuit.


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Appellant,

vs.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the Southern Division of the United States
District Court for the Northern District of
California

No. 36787-R

IN BANKRUPTCY

In the Matter of

BUDDIE JEROME HAYNER,

Bankrupt.

PETITION FOR RECLAMATION

To the Above-Entitled Court and to Burton J.
Wyman, Esq., Referee in Bankruptcy Thereof,
at San Francisco, California:

The petition of Budget Finance Plan, Incorporated, a corporation, respectfully represents:

1. That John O. England is the duly appointed and acting Trustee in Bankruptcy of the estate of the above-named Buddie Jerome Hayner, a bankrupt.

2. That said Trustee has in his possession the following described property, to-wit:

Multiplex—12" cutoff saw—40-A, Serial #40AA1386
12" Table Saw—Heavy duty—Derra James #683
1 Drill Press—Walker Turner, Serial #1944
1 Drum Sander—Max Universal—16 inch
1 1-H.P. Spray Compressor #120223—De Vilbiss
1 ½-H.P. Spray Compressor #146894—De Vilbiss
1 Portable Hand Sander #681046—Skil Sander
1 Band saw—½ H.P.—Craftsman #677477

1 Joiner—Craftsman #10323320

1 1941 Ford Stake Truck, Motor No. IGT78581, Serial No. IGT78581, License No. EP8425, 6 cylinders;

1 1941 Chevrolet Stake Truck, Motor No. BV437667, Serial No. GYR05-7148, License No. P5594, 6 cylinders;

1 Buick 1946 4-door Sedan, Motor No. 45881335, Serial No. 24381039, License No. 44K730, 8 cylinders.

3. That on the 18th day of February, 1947, the said bankrupt, Buddie Jerome Hayner, also known as Jerry B. Hayner, executed a notice of his intention to mortgage the above-described personal property to Budget Finance Plan, Inc., a corporation, the petitioner herein, which notice recited that said mortgage would be delivered and the consideration thereof would be paid on February 26, 1947.

4. That a certain promissory note and chattel mortgage was made and executed by said bankrupt to your petitioner on February 18, 1947, and on February 26, 1947, said promissory note and chattel mortgage, copy of which is hereto attached, marked Exhibit "A," and made a part hereof, were delivered to your petitioner.

5. That on or about the 21st day of March, 1947, a certified copy of said chattel mortgage was registered and filed with the Division of Registration of the Department of Motor Vehicles, of the State of California, covering the aforesaid motor vehicles. That on the 14th day of June, 1947, said chattel mortgage was recorded in the Office of the County Recorder of the County of Alameda, State of California, and assigned Document No. AB51024.

6. That on February 26, 1947, the date said chattel mortgage was delivered to your petitioner, The Bank of Pinole of Crockett, California, was the legal owner of the aforesaid Ford truck; the Universal C. I. T. Credit Corporation of Oakland, California, was the legal owner of the said Chevrolet truck; the Bank of Berkeley of Berkeley, California, was the legal owner of said Buick automobile, and the bankrupt was the registered owner of all of said motor vehicles. That thereafter, upon demand of [2*] your petitioner and the payment by it of certain obligations owing by the bankrupt to each of said legal owners, the latter surrendered to your petitioner the ownership certificates of said motor vehicles and endorsed and released said legal ownership thereof to your petitioner.

7. That at the time of the filing of the petition in bankruptcy herein there had been paid on account of said promissory note held by your petitioner the sum of Two Hundred Twelve and 00/100 (\$212.00) Dollars on account of principal thereof, and the sum of Two Hundred Eighteen and 75/100 (\$218.75) Dollars on account of interest thereon, and there now remains due, owing and unpaid thereon the sum of Four Thousand, Seven Hundred Eighty-seven and 10/100 (\$4,787.10) Dollars, plus interest.

8. That by reason of the premises and the aforesaid facts your petitioner is entitled to immediate

*Page numbering appearing at foot of page of original certified Transcript of Record.

possession of all of said personal property hereinabove described.

9. That said property is of a value less than the amount owing thereon; that prior to the filing of this petition, your petitioner duly demanded from said Trustee surrender of said property but that said Trustee has refused and failed to surrender said property and ever since has refused and failed to surrender the same to your petitioner.

Wherefore, your petitioner prays for an order upon said Trustee requiring said Trustee to surrender said property to your petitioner and for such other and further relief as may be just in the premises.

BUDGET FINANCE PLAN,
INC.,

Petitioner,

By CHARLES H. AHRENS,

Vice-President of

Said Corporation.

STANLEY M. McLEOD,

CARROLL F. JACOBY,

Attorneys for Petitioner. [3]

State of California,

City and County of San Francisco—ss.

Charles H. Ahrens, being duly sworn, deposes and says:

That he is a Vice-President of Budget Finance Plan, Inc., a corporation, the petitioner herein, and that he is authorized to, and does hereby, make this affidavit for such petitioner.

That he has read the within and foregoing Petition for Reclamation, and knows the contents thereof, and that the same is true of his own knowledge.

CHARLES H. AHRENS,
Vice-President.

Subscribed and sworn to before me this 14th day of July, 1947.

[Seal] WM. E. SCHORD,
Notary Public in and for the City and County of
San Francisco, State of California. [4]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE ON PETITION
FOR RECLAMATION

Upon reading and filing the petition of Budget Finance Plan, Incorporated, a corporation, wherein said petitioner prays for an order requiring John O. England, Trustee in the above-entitled proceeding, to surrender to said petitioner certain personal property described in a chattel mortgage heretofore executed by the bankrupt herein to said Budget Finance Plan, Incorporated.

Now, upon motion of Stanley M. McLeod and Carroll F. Jacoby, attorneys for said petitioner.

It Is Hereby Ordered that the said John O. England, Trustee as aforesaid, be, and he is, hereby required to appear before the undersigned Burton J. Wyman, Esq., Referee in Bankruptcy, at the courtroom of said Referee, Room 609 Grant Building, Seventh and Market Streets, San Francisco,

California, on the 22nd day [6] of July, 1947, at 2 o'clock in the afternoon, to show cause, if any he has, why such order should not be granted.

It Is Further Ordered that service of said Petition and this Order upon the said Trustee, on or before July 16, 1947, shall be sufficient notice of the hearing on said petition.

Dated: July 15, 1947.

/s/ BURTON J. WYMAN,
Referee in Bankruptcy.

[Endorsed]: Filed with Referee July 15, 1947.

[Endorsed]: Filed with Clerk Oct. 27, 1947. [7]

[Title of District Court and Cause.]

TRUSTEE'S ANSWER TO PETITION FOR
RECLAMATION AND ORDER TO SHOW
CAUSE

Now comes John O. England, the duly appointed and acting trustee of the estate of the above named bankrupt and answering the Petition for Reclamation filed herein by Budget Finance Plan, Incorporated, a corporation, admits, denies and alleges:

Trustee admits the allegations contained in paragraphs 1, 2 of said petition for reclamation.

Answering the allegations contained in paragraphs 3, 4, 5, 6, 7, 8 and 9 of said Petition for Reclamation, Trustee alleges that he has no information or belief sufficient to enable [8] him to answer the allegations in said paragraphs contained

and placing his denial on that ground, denies each and every, all and singular, generally and specifically the allegations in said paragraphs contained.

As and for a Second, Separate and Distinct Defense to Said Petition for Reclamation, Trustee Alleges:

That the chattel mortgage as alleged in said Petition for Reclamation is invalid as against the Trustee for the reason that it was not recorded as required by law.

Wherefore, the Trustee prays that the prayer in said Petition for Reclamation be denied; that the order to show cause issued thereon be discharged; that said petition be hence dismissed with costs in favor of said Trustee, and for such other or further order and relief as may be meet and proper in the premises.

JOHN O. ENGLAND,
Trustee.

MAX H. MARGOLIS,
Attorney for Trustee.

United States of America,
Northern District of California,
City and County of San Francisco—ss.

John O. England, being first duly sworn, deposes and says:

That he is the person named and described in the foregoing Trustee's Answer to Petition for Reclamation and Order to Show Cause; that he has read the Answer, knows the contents thereof and hereby makes solemn oath that the statements con-

tained therein are true to the best of his knowledge, information and belief.

JOHN O. ENGLAND,

Subscribed and Sworn to before me this 16th day of July, 1947.

[Seal]

LOUIS WIENER,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed with Referee July 17, 1947.

[Endorsed]: Filed with Clerk Oct. 27, 1947. [9]

[Title of District Court and Cause.]

ORDER DENYING PETITION FOR RECLAMATION FILED HEREIN ON BEHALF OF BUDGET FINANCE PLAN, INCORPORATED

This matter comes before the court on a Petition in Reclamation filed herein on July 15, 1947, by Stanley M. McLeod, Esq., and Carroll F. Jacoby, Esq., on behalf of Budget Finance Plan, Incorporated, a corporation; upon the order to show cause based upon said Petition in Reclamation; upon the Answer to said Petition in Reclamation, filed herein by Max H. Margolis, Esq., on behalf of John O. England, the trustee of the above named bankrupt's estate; upon the record herein, including the evidence offered and received relative to said petition, Order to Show Cause and Answer, at the time of the hearing held before the undersigned referee on July 22, 1947.

The matter having been submitted on briefs, and said briefs having been placed before the court, and the court, having considered said briefs in connection with the aforesaid evidence and the record herein, and now being advised fully in the premises, finds that:

1. The chattel mortgage, upon which said claimant, Budget Finance Plan, Incorporated, a corporation, bases its claim for reclamation, was executed by the above-named bankrupt, in the County of Alameda, State of California, on February 18, 1947;
2. The chattel mortgage, executed as aforesaid, was not offered for registration with the Division of Registration of the Department of Motor Vehicles of the State of California, until March 21, 1947; [10]
3. The chattel mortgage, executed as aforesaid, was not recorded in the County of Alameda, State of California, until June 14, 1947;
4. Taking into consideration all the facts and circumstances shown by the record, and particularly insofar as the time elapsing between the date of the execution of said chattel mortgage and the registering thereof with the Department of Motor Vehicles is concerned, said chattel mortgage was not offered for registration with the Division of Registration of the Department of Motor Vehicles of the State of California within a reasonable time after its execution and was, and now is, void

as against all creditors who became such prior to the date upon which said chattel mortgage was offered for registration;

5. The chattel mortgage; as against all creditors who became such prior to the date upon which said chattel mortgage was offered for registration with the Division of Registration of the Department of Motor Vehicles of the State of California, was, at the time of the filing of the petition in bankruptcy herein, and now is, invalid;
6. There are numerous creditors of the bankrupt who became such creditors prior to the date upon which said chattel mortgage was offered for registration with the Division of Registration of the Department of Motor Vehicles of the State of California.

Based upon the record herein, including the evidence offered and received upon the hearing of said Petition for Reclamation and the Findings of Fact hereinbefore set forth, the court concludes as matters of law that:

1. The failure and neglect of the mortgagee, Budget Finance Plan, Incorporated, or any one on its behalf, to offer said chattel mortgage for registration with the Division of [11] Registration of the Department of Motor Vehicles of the State of California until more than thirty days after the date of the execution of said chattel mortgage was an unreasonable delay and that, as a consequence of said unreasonable delay said chattel mortgage be-

came, and now is, void as against all creditors of the bankrupt who became creditors of said bankrupt prior to the date said chattel mortgage was offered for registration with the Division of Registration of the Department of Motor Vehicles of the State of California and that said Petition for Reclamation should be denied and the Order to Show Cause based thereon discharged, and

2. Because counsel for the mortgagee stated in open court that the delay in recording said chattel mortgage in Alameda County, State of California, until June 14, 1947, was an unreasonable delay after the date of the execution thereof, the effect of said last mentioned delay has become, and now is, moot.

It Hereby Is Ordered that the Petition for Reclamation filed herein by and/or in behalf of Budget Finance Plan, Incorporated, be, and it is Denied, and the Order to Show Cause be, and it is, Discharged, all without prejudice, however, to said Budget Finance Plan, Incorporated, to file an unsecured claim herein, in such amount as it may be advised.

Dated: July 31, 1947.

BURTON J. WYMAN,
Referee in Bankruptcy.

[Endorsed]: Filed July 31, 1947. Burton J. Wyman, Trustee in Bankruptcy.

[Endorsed]: Filed October 27, 1947. [12]

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S
ORDER DENYING PETITION FOR RECLAMATION ON BEHALF OF BUDGET
FINANCE PLAN, INC.

To Burton J. Wyman, Esq., Referee in Bankruptcy:

The petition of Budget Finance Plan, Inc., a corporation, respectfully represents and shows:

1. That your petitioner is a creditor of Buddie Jerome Hayner, bankrupt herein, and claims as security a chattel mortgage on certain motor vehicles and equipment.

2. That heretofore, on the 15th day of July, 1947, petitioner filed its Petition for Reclamation, verified July 14, 1947, to recover possession of said motor vehicles and equipment from the Trustee herein, and an Order to Show Cause was duly issued thereon.

3. That thereafter, on July 22nd, 1947, the said matter came on regularly for hearing on the said Petition for Reclamation, Order to Show Cause, and Answer of Trustee.

4. That thereafter and on the 31st day of July, 1947, the said Referee did make Findings of Fact, Opinion, Conclusions of Law, and an Order thereon; that the said Order is as follows:

It Is Hereby Ordered that the Petition for Reclamation filed herein by and/or in behalf

of Budget Finance Plan, Incorporated, be, and it is, Denied, and the Order to Show Cause be, and it is, Discharged, all without prejudice, however, to said Budget Finance Plan, Incorporated, to file an unsecured claim herein, in such amount as it may be advised.

Dated: July 31, 1947.

BURTON J. WYMAN,
Referee in Bankruptcy.

5. The said Order is erroneous for the following reasons: [13]

- a. That the said Order and the opinion supporting it are against law.
- b. That the Findings of Fact and Conclusions of Law upon which said order is based are not supported by and are inconsistent with the evidence herein.
- c. That the Findings of Fact do not support and are inconsistent with the Opinion, Conclusions of Law and Order herein.
- d. That the said Order does not follow the rule laid down by the Court in *In Re Mercury Engineering, Inc.*, 68 Fed. Sup. 376 (D.C., S.D., Calif., Central Div.).
- e. That the Findings of Fact fail to find on a material issue, in this, that the evidence shows without contradiction that the delay in filing the chattel mortgage with the Department of Motor Vehicles, if any, was due to the failure

of the said Department of Motor Vehicles to issue certificates of registration, and through no fault of petitioner.

- f. That the Findings of Fact fail to find on a material issue, in this, that the evidence shows without contradiction that the transfer of legal ownership in said motor vehicles occurred between Universal CIT Corporation, Bank of Berkeley, and Bank of Pinole, the then legal owners, and petitioner, and not from the bankrupt; that there was therefore no transfer of interest in the motor vehicles from bankrupt to petitioner except the excess, if any, over the interests of said transferees in the total sum of \$4,024.30.
- g. That the Findings of Fact fail to find on a material issue, in this, that the evidence shows without contradiction that the total value of said motor vehicles is the sum of \$4,000.00, and that the unpaid balance due petitioner is in excess of \$4,700.00.
- h. That Findings of Fact 4, and Conclusions of Law 1, insofar as they find or hold that the delay, if any, was unreasonable and that therefore the chattel mortgage is void [14] are contrary to the law and the evidence, and that the record shows that the delay in registering the said chattel mortgage with the Department of Motor Vehicles, if any, was a reasonable one.

Wherefore, your petitioner prays for a review of said Order by the Judge, and that the said Order be vacated and set aside.

Dated: August 9, 1947.

BUDGET FINANCE PLAN, INC.

Petitioner,

By C. H. AHRENS,

Vice-President of Said Corporation.

STANLEY M. McLEOD,

CARROLL F. JACOBY,

Attorneys for Petitioner.

State of California,

City and County of San Francisco—ss.

C. H. Ahrens, being duly sworn, deposes and says:

That he is a Vice President of Budget Finance Plan, Inc., a corporation, the petitioner herein, and that he is authorized to, and does hereby make this affidavit for said petitioner.

That he has read the within and foregoing petition for review and knows the contents thereof; that the same is true of his own knowledge.

C. H. AHRENS.

Subscribed and sworn to before me this 9th day of August, 1947.

[Seal]

THOMAS J. BEGLEY,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed August 9, 1947. Burton J. Wyman, Referee in Bankruptcy.

[Endorsed]: Filed October 27, 1947. [16]

In the Southern Division of the United States
District Court for the Northern District of
California

No. 36787-R

IN BANKRUPTCY

In the Matter of

BUDDIE JEROME HAYNER, also known as
Jerry B. Hayner,

Bankrupt.

CERTIFICATE AND REPORT OF REFEREE
ON PETITION FOR REVIEW OF REF-
EREE'S ORDER DENYING PETITION
FOR RECLAMATION ON BEHALF OF
BUDGET FINANCE PLAN, INCORPO-
RATED

To Honorable Michael J. Roche, United States
District Judge for the Northern District of
California:

I, Burton J. Wyman, one of the referees in
bankruptcy of this court and the referee in charge
of the above-entitled bankruptcy proceeding, cer-
tify and report as follows:

On July 15, 1947, Budget Finance Plan, Incor-
porated, filed its Petition in Reclamation herein
whereby it sought to reclaim from John O. England,
as the trustee in bankruptcy of the estate of the

above named bankrupt, the personal properties described in said petition as follows: [17]

- “Multiplex—12” cutoff saw—40-A. Serial #40AA1386
- 12” Table Saw—Heavy duty—Derra James #683
- 1 Drill Press—Walker Turner, Serial #1944
- 1 Drum Sander—Max Universal—16 inch
- 1 1-H.P. Spray Compressor #120223—De Vilbiss
- 1 ½-H.P. Spray Compressor #146894—De Vilbiss
- 1 Portable Hand Sander #681046—Skil Sander
- 1 Band saw—½ H.P.—Craftsman #677477
- 1 Joiner—Craftsman #10323320
- 1 1941 Ford Stake Truck, Motor No. IGT78581, Serial No. IGT78581, License No. EP8425, 6 cylinders;
- 1 1941 Chevrolet Stake Truck, Motor No. BV437667, Serial No. GYR05-7148, License No. P5594, 6 cylinders;
- 1 Buick 1946 4-door Sedan, Motor No. 45881335, Serial No. 24381039, License No. 44K730, 8 cylinders.”

In addition to setting out the aforesaid descriptions of the properties sought to be reclaimed, the Petition in Reclamation also averred, in substance, that on February 18, 1947, said bankrupt executed a notice of said bankrupt’s intention to mortgage the above described personal properties to said Petitioner in Reclamation and that said notice stated that said mortgage would be delivered and the consideration therefor would be paid on February 26, 1947; that a certain promissory note and chattel mortgage was made and executed by said bankrupt to said Budget Finance Plan, Incorporated, on February 18, 1947, and on February 26, 1947, said promissory note and chattel mortgage were delivered to said petitioner in reclamation; that on March 21, 1947, a certified copy of said

chattel mortgage, covering the aforesaid motor vehicles, was filed with the Division of Registration of the Department of Motor Vehicles of the State of California, and on June 14, 1947, said chattel mortgage was recorded in the office of the Recorder of the County of Alameda, State of California; that on February 26, 1947, the date upon which said chattel mortgage was delivered to said petitioner in reclamation, The Bank of Pinole, of Crockett, California, was the legal owner of the aforesaid Ford truck; Universal C.I.T. Credit Corporation of Oakland, California, was the legal owner of said Chevrolet truck; Bank of Berkeley, Berkeley, California, was the legal owner of the Buick automobile, and the bankrupt was the registered owner of all said motor vehicles; that thereafter, upon demand of said petitioner in reclamation and the payment of the obligations owing by the bankrupt to each of said [18] legal owners, said legal owners surrendered to said petitioner in reclamation the ownership certificates of said motor vehicles and endorsed and released the ownership of said motor vehicles to said petitioner in reclamation; that at the time of the filing of the petition in bankruptcy, in the above entitled matter, there had been paid on account of said promissory note, held by said petitioner in reclamation, the sum of \$212.00, on account of principal, and the sum of \$218.75, on account of interest, and that there remained due, owing and unpaid, the sum of \$4,787.10, plus interest, as of the date of said petition in

reclamation; that the petitioner of reclamation is entitled to the immediate possession of all said personal properties described above; that said properties are of a value less than the amount owing thereon; that prior to the filing of the petition in reclamation, the petitioner therein demanded from the trustee in bankruptcy the surrender of said properties, but that said trustee had refused and failed to surrender said properties ever since said demand.

The petition in reclamation ends with the prayer, in substance, that an order be made requiring the trustee to surrender said properties to said petitioner in reclamation and that said petition in reclamation be granted such other and further relief as may be just in the premises.

On July 17, 1947, and in response to the Order to Show Cause, based upon said petition in reclamation, John O. England, as said trustee in bankruptcy, filed herein an answer to said petition in reclamation.

In substance, the Answer admitted, and admits, that John O. England is the appointed and acting trustee in bankruptcy of the estate of the above named bankrupt and that said trustee has in his possession the above described personal properties.

As to the other allegations contained in said petition in reclamation, i.e., those dealing with the executions and deliveries of the aforesaid promissory note and chattel mortgage; the registering and recording of said chattel mortgage, the legal ownership of the motor vehicles, the payments of the

obligations by the petitioner in [19] reclamation, the surrender of the certificates of ownership of said motor vehicles; the release of said legal ownerships to said petitioner in reclamation; the amounts owing and unpaid; the claim for the possession and the alleged shortage of value of said motor vehicles; the demand of the Petition for Reclamation for the surrender of said properties, said trustee, basing his denials on lack of information or belief sufficient to enable him to answer said last mentioned allegations, denied all of them, both general and specifically.

By way of a second, separate and distinct defense to said petition in reclamation, said trustee averred, in substance, that the chattel mortgage is invalid as against said trustee, for the reason that it was not recorded as required by law.

The Answer concludes with the prayer, in substance, that the petition in reclamation be dismissed, with costs in favor of the trustee, the Order to Show Cause discharged, and that said trustee have such other or further order and relief as may be meet and proper in the premises.

Among other things which the chattel mortgage, in substance provides, are that the 20th Century Fixture Co., by Jerry B. Hayner, mortgages to Budget Finance Plan, Incorporated, the hereinbefore described personal properties; that the entire balance might be declared due and payable forthwith; that the mortgagee, or assigns, without previous notice or demand, might, at its option, take

possession of said properties, according to law; that if, upon a sale of such properties, insufficient funds should be realized to pay the obligations secured by said chattel mortgage, the mortgagor would pay the deficiency on demand.

Contained in said chattel mortgage, and as a part thereof, is a promissory note reading as follows: [20]

“\$5000.00 Oakland, California, Feb. 18, 1947

“For Value Received, on or before July 17, 1948, the undersigned jointly and severally promise to pay to the order of Budget Finance Plan (License No. 81645LA) at its office in Oakland, California, in lawful money of the United States, the sum of Five Thousand and no/100 Dollars, payable in eighteen successive monthly installments of \$335.90 each, which includes charges at the rate of 2% per month on that part of the unpaid principal balance of said loan not in excess of \$100.00 and 2% per month on any remainder, the first of which installments shall be payable on the 26th day of March, 1947, and a final installment covering any unpaid balance including charges as afore-said due and owing on the due date above mentioned. Payments shall be deemed made only when received by payee. The word ‘charges’ shall be deemed to include interest at 10% per annum.

“Default in the payment of all or any part of the amount owing hereon at any time or

times, shall at the option of the holder, render the entire principal balance and accrued charges immediately due and payable. Extension of time of payment shall not waive future strict performance, nor shall it affect the liability of any party hereto or surety, guarantor or endorser, all of whom severally waive demand presentment, notice of non-payment, notice of protest and protest. All or any part of the principal sum of this note may be paid at any time together with charges to date thereof. All payments received shall be credited first to charges to date and the balance to principal."

When on July 22, 1947, said petition in reclamation, said Order to Show Cause and said Answer to said petition in reclamation came on for hearing before me, as the referee in bankruptcy in charge of the above-entitled bankruptcy proceeding, the following, in substance, occurred:

Stanley McLeod, Esq., representing said petitioner in reclamation, immediately stated that, inasmuch as the chattel mortgage involved had been executed on February 18, 1947, the recorded notice of intention to mortgage having fixed February 26, 1947, as the consummation date, and the chattel mortgage had not been recorded in the office of the Alameda County Recorder until June 14, 1947, he would concede, on the part of said petitioner in reclamation, that said chattel mortgage was void, as against creditors, insofar as all personal properties, except the motor vehicles, are concerned.

Thereupon, Charles H. Ahrens, vice president of Budget Finance Plan, Incorporated, the petitioner in reclamation herein, was called as a witness for said petitioner.

In substance, said witness testified: [21]

That he was familiar with a transaction between petitioner in reclamation and the bankrupt; that the Oakland office of the organization advanced a loan to the bankrupt under date of February 18, 1947, in the amount of \$5,000.00, the purpose of which was to pay off three separate loans on the vehicles bankrupt owned at that particular time; that at that time one of the vehicles was encumbered by the Bank of Pinole in the amount of \$807.10; on another, the bankrupt was obligated to the Universal C.I.T. in the amount of \$929; on a 1946 Buick, to the Bank of Berkeley in the sum of \$2,288.20; that there was a total lien against these three vehicles of \$4,024.30; that bankrupt applied for a refinancing of the indebtedness plus an additional amount of cash for use in his business; that bankrupt offered as security for the loan, the three vehicles and what personal property in the nature of equipment and machinery bankrupt had in the 20th Century Fixture Company, of which I understood bankrupt was the sole owner;

That the petitioner in reclamation received the pink certificates of ownership of the vehicles from the respective places that were paid off,—The Bank of Pinole, the Universal C.I.T. and the Bank of Berkeley; that the petitioner in reclamation did not obtain the white certificates for a considerable

time after the completion of the loan, because the white certificates at the time the loan was made, were in transit to Sacramento; that that was during the month of February; that they were in transit to Sacramento for the 1947 licenses and had not been returned from Sacramento; that they are used as a receipt for application for the current year license. (At this point the witness, Ahrens, was withdrawn from the stand.)

Buddie Jerome Hayner, the bankrupt, then was called as a witness for said petitioner.

In substance, said witness testified:

That he had a business transaction with the Budget Finance Plan, Incorporated; that that transaction was in regards to a loan; [22] that the witness went to the Budget Finance Company and asked it to loan the witness a sum of money, which it did, for improvements of the witness' business; that the witness identified as his signature, the name signed to a document entitled "Statement of Loan"—"Budget Finance Plan"; (The last-mentioned document was thereupon offered and received in evidence as claimant's Exhibit No. 1.)

That, on being shown a duplicate chattel mortgage and promissory note dated February 18, 1947, said witness testified that the name thereon was a copy of his signature and that the duplicate document was executed at the time that the original chattel mortgage and promissory note were executed. (Thereupon the last-mentioned document was received in evidence as claimant's Exhibit No. 2.)

That at the time of the execution of the chattel mortgage and promissory note, said witness received the sum of \$900.00 and some odd; that the difference between the \$900.00 and \$5,000.00 was money paid off on debts of the witness on two trucks and one automobile and a personal loan; that the signatures on three documents entitled, "Authorization for Pay-Off" dated February 18, 1947, were those of the witness; that said authorizations to pay off indicated that the one addressed to the Bank of Berkeley, Berkeley, California, directed them to accept from the Budget Plan Company \$2,288.20, being the balance due on the accounts of the witness to the bank on a 1946 Buick; that a second one to the Universal C.I.T. Credit Corporation, 1440 Broadway, directed them also to accept from the Budget Finance Plan, \$929.00, on a 1941 Ford truck; that the final one to the Bank of Pinole at Crockett, California, directed it to accept from the Budget Finance Plan the sum of \$807.10 due on a 1941 Ford. (Thereupon the three last-mentioned documents were received in evidence as claimant's Exhibit No. 3.)

That the Bank of Pinole advanced the cash in the sum of \$550.00 to the witness for payroll; that it had no security outside of the witness' note and the automobile and trucks were with the Standard Finance, one-third down was required by law and the witness financed the rest; that the witness did not hold the pink slips on these [23] vehicles; that at that time, the witness assumed that the banks

did; that they were holding them as security for these indebtednesses; that the witness never had been the legal owner of any of these vehicles; that the witness was the registered owner; that in February, at the time the witness executed the chattel mortgage and promissory note, said witness did not have the white registration slips; that they were in transit to the Motor Vehicle Department; that the witness believed that he had turned them in when he made application for license plates; that the witness then was not able to give the white slips to the Budget Finance Plan; that the witness made one payment, one full payment, to the Budget Finance Plan on this mortgage and note and made another payment on the interest, because he could not meet the second payment; that the witness paid the interest that month on the amount of the note; that the two sums totaled \$300.00, some on one, on the regular payment for the note, which there is a record of; that on the other, the witness paid \$92.00, \$98.00, something like that;

On cross-examination the witness testified, in substance:

That the witness did not execute any documents, down in the office of the Budget Finance Company when he made the loan, except the three exhibits just shown him, but that he was called back approximately two months later, after the Budget Finance Company had received the white slips, to sign the white slips so that they could be sent down with

the pink slips, so the Budget Finance Company could register the cars as legal owner; that the white slips came to the witness; that he took them and showed them to the Budget Finance Company; that they still had the pink slips; that they had not sent the pink slips up yet, or something; that the witness didn't know what the mix-up was; that the witness signed the white slips then and turned them over to Mr. Burnett of the Budget Finance Company; that he, in turn, sent them along with the pink slips to register it as legal owner. [24]

That the Ford truck was kept on the premises and Mr. Green might have used the Chevrolet to and from home; that after the day's work, the Ford was stored there with the rest of these miscellaneous items, usually, once in a while it was used.

On re-direct examination, the witness, in substance, testified:

That he got the white slips back from Sacramento and sent them over to the Budget Finance Company; that the witness did not recall when he got them back from Sacramento; that he did know it was after the time the loan was negotiated; that he didn't remember how long after, but it was some time; that the witness thought it was around a month, a month and a half, possibly two months; that after he received the pink slips, the witness thought it was two or three days until he got around taking them to the Budget Finance. then he went in and took care of it.

Recalled on behalf of the reclamation petitioner, Charles H. Ahrens testified, in substance:

That he had seen a letter from the Division of Registration, Department of Motor Vehicles, Sacramento, California, dated April 17, 1947, addressed to Budget Finance Plan, 419 14th Street, Oakland, California; that the witness obtained it from the files the office carries on that account; that it is a part of the file relating to the bankrupt's loan; that the witness did not know specifically when it was received by his company; that he knew it was dated April 17, and mailed from Sacramento on April 17, addressed to the Budget Finance Plan in Oakland, so it was some time after April 17; usually it takes one day to come from Sacramento to Oakland. (This letter was thereupon introduced in evidence as claimant's Exhibit No. 4.)

That the bankrupt at the present time is indebted to the witness' company; that the witness did not have the exact figure; that the witness furnished counsel (McLeod) with the figures; that the [25] principal sum of \$4,787.10 with interest due from April 26, 1947, that is, \$4,787.10 plus interest from April 26, this year; that the witness was reasonably familiar with the re-sale value of used automobiles, with the type and make of automobiles set forth in the chattel mortgage; that the witness was aware there are involved a 1941 Stake Truck and a 1941 Chevrolet Stake Truck and a 1946 Buick, four-door sedan; that it was the opinion of the witness that the market value of the 1941 Ford Stake Truck was in the neighborhood of \$800.00 or \$900.00; that

it was the opinion of the witness that the 1946 Buick automobile was of the value of between \$2000.00 and \$2,200.00.

On cross-examination the last-named witness testified, in substance:

That he last had seen the 1941 Ford Stake truck about 12 o'clock on the day he testified; that it was located on Harrison near 16th in Oakland; that it happened to be in a parking lot where the witness had parked his car; that the witness did not examine it with any particularity; that it is the occupation of the witness to make loans on motor vehicles in California; that it has been for a period of some seventeen or eighteen years; that naturally, he would be familiar with the market values of all motor vehicles as used as security and the biggest percent of all business that the Budget Finance Plan does, does in the State of California; that the witness did not turn the motor over that day; that so far as the witness could recall the last time he saw it in operation was June 28th; that on June 28th or 29th, it was brought in from the place that the bankrupt apparently had left it or moved to out at Walnut Creek; that the witness had not seen the 1941 Chevrolet Truck; that the witness took his estimated value of \$800.00 or \$900.00 from the experienced opinion of the personnel of his San Francisco office; that the witness had no independent knowledge of his own by way of observation; that the witness could not swear whether it was newly or freshly painted, whether there was a new

motor in it, or not; that the witness [26] did not personally see the 1946 Buick Sedan; that the price of \$2,000.00 or \$2,400.00* was taken from the opinion of the personnel the witness has in the San Francisco office who had seen it; that it was not his own opinion; that the witness did not know whether it was freshly painted; that the witness thought that it would make a difference in the price of the car if it were freshly painted, a motor clean-up; in those two instances the basis for the figure that the witness gave the court was from outside information, not his own; that as to whether or not there was any correspondence had with Sacramento which antedated claimant's No. 4, there is a carbon copy of an advice to the Department of Motor Vehicles at Sacramento, that we had attached a certified copy of the chattel mortgage and the titles to such chattel mortgage to the Motor Vehicle Department along with the necessary fees which the witness believed they acknowledged; that the copy of that letter is in the Oakland office; that the date of this transaction was March 21; that the letter of transmittal is dated March 21, 1947, and covers the transaction with which we are here concerned; that the reason for waiting from February 18th to March 21st before sending the transmittal with the necessary papers to Sacramento was because Mr. Hayner did not have the

*The previous testimony of the witness was that the value of said automobile was \$2,000.00 or \$2,200.00.

registration slips and in order to complete the due filing with the Department of Motor Vehicles, they require that you have accompanying the chattels, the ownership certificates and also the registration certificates before they will complete the recordation of it; that the witness did not know what date the petitioner had the pink slips; that they merely made the transaction on February 18, 1947; drew up the contract and mailed, presumably the checks to these respective companies, attached to an original of these authorizations, requesting them to accept the money and send us titles to the vehicles; that the witness did not know when the titles to the vehicles were received from the Pinole Bank, the Berkeley Bank and the Universal C.I.T. Credit Corporation; that the witness did not think that his file would show it; that the cancelled checks going to those three [27] parties would tell what time the bank honored the checks, that is all; that the witness had no means of knowing what the actual date the office received these particular certificates; that the witness doubted very much whether there would be anything in the files to indicate what date they were received; that they have no reason to make a record as to when they receive certificates from a company; that they would pay a loan off, make records, of various natures, not of that; that they didn't affix any file stamp to the letter of transmittal; that they did with the check-off when received from the Department of Motor Vehicles, not from anyone else; that the

witness didn't know whether there were any letters accompanying the pink ownership certificates from the three parties to whom they made the pay-offs; that there was a notice of intention to mortgage this property executed by the petitioner; that oft-times we wait before we sent the pink ownership certificates to Sacramento, especially do we do that in the months of February and March; that it is necessary in the State of California that a motor vehicle registrant send in, the witness thought, the first Monday of February, somewhere around the 5th or 6th, he must send in an application for the current year's tax by that date or be fined a substantial figure; that in making loans during that period of time, why, it is common practice to complete them when we obtain the ownership certificate and await the disposition of the Department of Motor Vehicles in Sacramento to send back the current registration before we go through the mechanics of sending up a chattel mortgage and title, because of the fact that it just duplicates the work; that we have to do the same thing all the time; that in other words, we also wait for the registration certificates, the usual practice in an office—we all have a way of doing business—in our office, the practice is that every week or ten day periods; that, the witness assumed, that are completed, that accumulate between the week or ten days periods; that, the witness assumed, was the condition that prevailed with respect to this transaction. [28]

DISCUSSION BY, AND OPINION OF, REFEREE

At the conclusion of the hearing, the matter was submitted on briefs, and, in due time, briefs were filed by counsel for the respective interested parties.

In the brief filed on behalf of the reclamation petitioner, under the heading, “The Facts” counsel for said petitioner states:

“Shortly after February 18, 1947, the exact date being unknown, the certificates of ownership were delivered by the aforesaid security holders to petitioner * * *”

Having in mind the foregoing statement, I considered it necessary, before making any order, to satisfy myself just what provisions of the law were necessary to be complied with in order to place the petitioner in a position to have its petition granted, in the event the facts were such as to permit the making of such an order. To that end, I examined the Vehicle Code of the State of California. The first applicable provision of the law which came to my attention was section 195 of said code. It reads:

“No chattel mortgage on any vehicle registered hereunder irrespective of whether such registration was affected prior or subsequent to the execution of such mortgage, is valid as against creditors or subsequent purchasers or encumbrancers until the mortgagee or his successor or assignee has deposited with the de-

partment, at its office in Sacramento, a copy of said mortgage with an attached certificate of a notary public stating that the same is a true and correct copy of the original, accompanied by a properly endorsed certificate of ownership to the vehicle described in said mortgage, if said vehicle is then registered hereunder, or if such vehicle is not so registered, by an application in usual form for an original registration, together with an application for [29] registration as legal owner, and upon payment of the fees provided in this code.” (Underlining referee’s.)

The next provision of said code which then appeared to me to have a bearing on whether or not the petitioner in reclamation was entitled to have its petition granted, is section 196, which states:

“When the chattel mortgagee, his successor or assignee, has deposited with the department a copy of the chattel mortgage as provided in section 195 thereof, such deposit constitutes constructive notice of said mortgage and its contents to creditors and subsequent purchasers and encumbrances * * *” (Underlining referee’s.)

Shorn of as much of the legal verbiage as, in my opinion, seems proper, and stated in ordinary language, all (with one exception), from the standpoint of the compliance with applicable statutory law, that the petitioner in reclamation needed to

have done to have placed it in a position wherein its actions would not have been subject to successful attack by creditors of the bankrupt was:

1. To have deposited with the Department of Motor Vehicles of the State of California, at its office in Sacramento,
 - (a) A copy of the chattel mortgage in controversy with an attached certificate of a notary public stating that said copy of chattel mortgage was a true and correct copy of the original, and
 - (b) The properly endorsed certificates of ownership to the vehicles described in the mortgage in controversy.

Had the thus laid-down procedure been followed, within a reasonable¹ time after the execution of said chattel mortgage by the bankrupt, the creditors of said bankrupt would have been without legal grounds upon which to base their opposition to the petition in reclamation. [30]

Inasmuch as the only documents with which the court was concerned in determining whether or not the petitioner in reclamation or the creditors should prevail in the controversy were the copy of the chattel mortgage and the certificates of ownership of the motor vehicles involved, I found the following questions propounded to the witness (Ahrens),

¹The deposit of the last mentioned documents within a reasonable time being the exception referred to above.

the representative of the reclamation petitioner, and the following answers given by such witness, more than interesting:

“Q. (By Counsel for Petitioner, McLeod): Mr. Ahrens, as far as the motor vehicles were concerned, did you obtain from anyone, the pink certificates of ownership² of the vehicles?

2“The department upon registering a vehicle shall issue a certificate of ownership to the legal owner (1) and a registration card (3) to the owner (2) or both to the owner if there is no legal owner of the vehicle.” Calif. Vehicle Code, Sec. 151.

[(1) “ ‘Legal owner’ is a person holding the legal title to a vehicle under a conditional sale contract, the mortgagee of a vehicle * * *” Calif. Vehicle Code, Sec. 67.]

[(2) “ ‘Owner’ is a person having all the incidents of ownership including the legal title of a vehicle whether or not such person lends, rents or pledges such vehicle; the person entitled to the possession of a vehicle as the purchaser under a conditional sale contract; the mortgagor of a vehicle, * * *” Calif. Vehicle Code, Sec. 66.]

[(3) “The registration card shall contain upon the face thereof the date issued, the name and address of the owner and of the legal owner, if any, the registration number assigned to the vehicle and a description of such vehicle as complete as that required in the application for registration for such vehicle.” Calif. Vehicle Code, Sec. 152.]

“(a) * * * The certificate of ownership shall contain upon the face thereof the identical information required upon the face of the registration card.

“(b) * * * The certificate of ownership shall contain upon the reverse side forms of notice to the department of a transfer of the title or interest of the owner or legal owner and an application for such transfer by the transferee.” Calif. Vehicle Code, Sec. 153.

"A. Yes, we received them from the respective places that were paid off.

"Q. You mean?

"A. The Bank of Pinole, the Universal C.I.T. and the Bank of Berkeley."

(Reporter's Transcript, page 7.)

"Q. (By Counsel for the Trustee): You had the pinks³ in your possession on February 18, 1947, or the day after, did you not?

"Mr. McLeod: He has not so testified, Counsel.

"A. I don't know what date we had the pinks, sir. We merely made the transaction on February 18, 1947.

"Mr. Margolis: Q. Yes?

"A. Drew up the contract and mailed, presumably the checks to these respective companies, attached to an original of these authorizations, requesting them to accept the money and send us titles to the vehicles.

"Q. When did you receive the titles to the vehicles from the people you just enumerated?

"A. I don't know.

"Q. Does your file show it?

"A. No, I don't think so.

³"Pinks," also called "pink slips," are expressions used to indicate "Certificates of ownership" referred to in sections 151, 153 and 196, California Vehicle Code.

“Q. Would the cancellation of your checks going to those three people you have enumerated refresh your memory if you could tell the dates from the cancellation stamps?

“A. That would tell us what time our bank honored the checks; that is all.

“Q. I mean with relation to your receipt of the ownership certificates?

“A. No, I have no means of knowing what the actual date was the office received these particular certificates.

“Q. Would there be anything in your files to indicate what date they were received?

“A. I doubt it very much. We have no reason to make a record as to when we receive certificates from a company. We would pay a loan off, make records, oh, of various natures, not of that.

“Q. You don't affix any file stamp to the letter of transmittal?

“A. Not in that case. We do with the check-off when received [32] from the Department of Motor Vehicles; not from anyone else.

“Q. Were there any letters accompanying the pink ownership certificates from the three persons to whom you made the pay-offs, received by your company?

“A. I don't know.

“Q. You don't know anything about it?

“A. No.

“Q. Would you know whether your file indicated that?

“A. If it does, I am positive Counsel has all the file connected with the transaction except the letter of the original transmission to the Department of Motor Vehicles of the pink slips. It is our usual practice not to save those things for any purpose whatsoever. The fact that we pay off, if the company sends the pink slip, the check serves the purpose. We have no reason for keeping merely a form letter, you might say, as usually attached, ‘We send in return for the money received.’ There is no point in keeping it.”

(Reporter’s Transcript, pages 24 and 25.)

In coming to the conclusion that had the procedure just above referred to been followed, the creditors would have been without any basis for an attack upon the validity of the chattel mortgage before the court, I did not overlook the fact that, in answer to the question propounded by counsel for the trustee, “Can you tell us any reason for waiting from February 18th to March 21st before sending the transmittal with the necessary papers to Sacramento?” the witness (Ahrens), the representative of the reclamation petitioner, while testifying in support of the petition in reclamation, had said, “Yes, because Mr. Hayner did not have the registration slips and in order to complete the due filing with the Department of Motor Vehicles, they require that you have accompanying the chattels, the ownership certificates and also the registration certificates before they will complete the recordation of it.”

(Reporter’s Transcript, page 23.)

However, in my opinion, this answer provided no legal excuse for the failure and neglect on the part of the reclamation petitioner [33] to take the necessary steps to give constructive notice of the execution of said chattel mortgage, within "a reasonable time" after such execution, inasmuch as section 196 of the California Vehicle Code declares that "When the chattel mortgage * * * has deposited with the department a copy of the chattel mortgage as provided in section 195 thereof such deposit constitutes constructive notice⁴ of said mortgage and its contents to creditors and subsequent purchasers and encumbrances * * *" (Underlining referee's.)

Because section 181 of the California Vehicle Code states, "The department upon receipt of a properly endorsed certificate of ownership and the proper registration card and upon receipt of the required fee shall register the vehicle under its registration number in the name of the new owner and new legal owner if any, and shall issue a new registration card and certificate of ownership as provided upon an original registration * * *" the reason for the long negligent delay on the part of the reclamation petitioner in sending the copy of the

⁴"The method provided in this chapter for giving constructive notice of a chattel mortgage on a vehicle registered hereunder is exclusive and any such chattel mortgage is excepted from the provisions of sections 2957, 2959, 2965 and 2966 of the Civil Code." Calif. Vehicle Code, Sec. 198.

chattel mortgage to the Department of Motor Vehicles at Sacramento might legally be justified, only, if the question of ownership of the motor vehicles, as of a particular date, were involved, but inasmuch as the only question which the court was called upon to determine, in the instant matter, was whether or not there was unreasonable delay in giving to creditors constructive notice of the execution of said chattel mortgage, the inadequacy of the excuse above given is readily to be seen. Particularly is this so, when two other significant facts are taken into consideration, i.e., (1) [34] the testimony of the witness (Ahrens)⁵ relative to the rec-

5“Q. (By Counsel for Trustee): And you say that oftentimes you wait before you send the pink ownership certificates to Sacramento?

“A. Especially do we do that in the months of February and March. It is necessary, in the State of California, that a motor vehicle registrant send in, I think the first Monday of February, somewhere around the 5th or 6th, he must send in an application for the current year's tax by that date or be fined a substantial figure. In making loans, during that period of time, why, it is common practice to complete them when we obtain the ownership certificate and await the disposition of the Department of Motor Vehicles in Sacramento to send back the current registration before we go through the mechanics of sending up a chattel mortgage and title, because of the fact that it just duplicates the work. We have to do the same thing all the time.

“Q. In other words, you wait until you get a batch together and send up?

“A. And we also wait for the registration certificates. The usual practice in an office—we all have a way of doing business—in our office, the

lamation petitioner's legally inexcusable system of delay in sending copies of chattel mortgages for deposit with the Department of Motor Vehicles (Reporter's Transcript, pages 25 and 26) and (2) the acknowledged unreasonable delay in the recordation of the very chattel mortgage (here in controversy) in the office of the Recorder of Alameda County, California.

In their briefs counsel for the reclamation petitioner urged very strongly that this matter should be governed by the ruling *In re Mercury Engineering, Inc.* (D.C., S.D., Calif.), 68 F. Supp. 376. But, in so urging the court to follow such ruling, counsel, in my opinion, overlooked two important factors, (1) that the facts in the above cited case have no kinship whatsoever with the facts in the matter now before the court, and (2) that a court is not bound to follow cases wherein the facts differ as plainly as do the facts *In re Mercury Engineering, Inc.*, *supra*, and those present herein.

See *Sharon v. Sharon* (S. Ct., Calif.), 75 Cal. 1, 26, 16 P. 345, 356, wherein it is said, "The language of a court must always be read in view of the facts before it," and *People v. Malowitz* (D.C. App., Calif.), 133 C.A. 250, 255, 256, 24 P. (2d) 177, 179, in which it is declared, "* * * by no judicial state-

practice is that every week or ten days we send up all we have acquired that are completed.

"Q. That accumulated between the week or ten days period? A. That is right.

"Q. That condition prevailed with respect to this transaction? A. Beg pardon, sir?

"Q. That condition prevailed with respect to this transaction? A. I would assume so."

ment, however accurate and justly applicable to the case under consideration, may later cases, perhaps dependent upon altered facts or conditions, be conclusively defined, limited or determined."

The major question which the court was called upon to decide herein was whether or not the creditors of the bankrupt had been given constructive notice of the existence of the chattel mortgage in controversy, within a reasonable time after the date of its execution.

In this connection, it is to be remembered that it thus has been held: "A delay may be necessary and yet unreasonable. If it is made necessary by the negligence of the party chargeable therewith, such delay is in legal contemplation unreasonable, however imperatively necessary it may have been," *Rogers v. Texas & P. Ry. Co.* (Ct. Civ. Apps., Texas), 94 S.W. 158, 162.

It was ruled in *National Bank of Bakersfield v. Moore* (C.C.A. 9), 247 F. 913, 918, that if a chattel mortgage is withheld beyond a reasonable time necessary for its being put on record, it [36] is void as against creditors of the mortgagor, regardless of whether they become creditors before or after its execution.⁶

⁶Examining the record herein as a federal court has the legal right to do, *Bowe-Burke Mining Co. v. Willcuts* (D.C., Minn.), 45 F. (2d) 394, 395, *The Golden Gate* (C.C.A. 9), 286 F. 105, 106; *Freshman v. Atkins*, 269 U. S. 121, 124, 46 S. Ct. 41, 42, 70 L. Ed. 193, 195, it unquestionably appears from the schedules of the bankrupt that said bankrupt, prior

In *Bank of America, etc., v. Sampsell* (C.C.A. 9), 114 F. (2d) 211, 213, the court said, "Giving effect to the rule announced in the decided state cases, it is fairly clear that the proper interpretation of § 195 of the Vehicle Code is that a mortgage on motor vehicles which is not promptly recorded is void as to creditors, and as to subsequent purchasers and encumbrances, whose interests arise prior to the date of compliance with the statute. This construction is in harmony with the declared policy of the state hostile to secret liens. *Calif. Civ. Code* § 3440; *Ruggles v. Cannedy*, 127 Cal. 290, 53 P. 911, 59 P. 827, 46 L.R.A. 371; *Noyes v. Bank of Italy*, 206 Cal. 266, 274 P. 68; *Washington Lumber & Millwork Co. v. McGuire*, 213 Cal. 13, 14, 1 P. 2d 437."

In their briefs, counsel for the petitioner in reclamation strongly urged that, inasmuch as the motor vehicles involved were subject to liens at the time a part of the money loaned to the bankrupt was used to pay off the claimed prior liens, the rule relative to the prompt deposits of copies of chattel mortgages with the Department of Motor Vehicles,

to the execution and depositing of the aforesaid copy of the chattel mortgage with the Department of Motor Vehicles was indebted to more than thirty creditors in an aggregate sum of considerably more than \$10,000.00, and that between the date of the execution of said chattel mortgage and said deposit thereof with the Department of Motor Vehicles, said bankrupt became indebted to creditors in a sum aggregating, at least \$300.00.

in order to foreclose attacks by interested creditors, does not apply. The argument, in my opinion, had to fail for two reasons, (1) because there is no law to justify such a holding, in the face of the decided cases of the State of California which must be followed by federal courts, and (2) because the validity of any of the purported prior liens never was before the court for determination; hence whether such purported liens were valid, or otherwise, never had to be determined by the court in this proceeding.

Having carefully considered the evidence and the briefs herein, I made the following order on July 31, 1947:

“This matter comes before the court on a petition in reclamation filed herein on July 15, 1947, by Stanley M. McLeod, Esq., and Carroll F. Jacoby, Esq., on behalf of Budget Finance Plan, Incorporated, a corporation; upon the order to show cause based upon said petition in reclamation; upon the answer to said petition in reclamation, filed herein by Max H. Margolis, Esq., on behalf of John O. England, the trustee of the above named bankrupt's estate; upon the record herein, including the evidence offered and received relative to said petition, order to show cause and answer, at the time of the hearing held before the undersigned referee on July 22, 1947.

“The matter having been submitted on briefs, and said briefs having been placed before the court, and the court, having considered said briefs in connec-

tion with the aforesaid evidence and the record herein, and now being advised fully in the premises, finds that:

“1. The chattel mortgage, upon which said claimant, Budget Finance Plan, Incorporated, a corporation, bases its claim for reclamation, was executed by the above-named bankrupt, in the County of Alameda, State of California, on February 18, 1947;

“2. The chattel mortgage, executed as aforesaid, was not offered for registration with the Division of Registration of the Department of Motor Vehicles of the State of California, until March 21, 1947;

“3. The chattel mortgage, executed as aforesaid, was not recorded in the County of Alameda, State of California, until June 14, 1947;

“4. Taking into consideration all the facts and circumstances shown by the record, and particularly insofar as the time elapsing between the date of the execution of said chattel mortgage [38] and the registering thereof with the Department of Motor Vehicles is concerned, said chattel mortgage was not offered for registration with the Division of Registration of the Department of Motor Vehicles of the State of California within a reasonable time after its execution and was, and now is, void as against all creditors who became such prior to the date upon which said chattel mortgage was offered for registration;

“5. The chattel mortgage, as against all creditors who became such prior to the date upon which said chattel mortgage was offered for registration with the Division of Registration of the Department of Motor Vehicles of the State of California, was, at the time of the filing of the petition in bankruptcy herein, and now is, invalid;

“6. There are numerous creditors of the bankrupt who became such creditors prior to the date upon which said chattel mortgage was offered for registration with the Division of Registration of the Department of Motor Vehicles of the State of California.

“Based upon the record herein, including the evidence offered and received upon the hearing of said petition for reclamation and the findings of fact hereinbefore set forth, the court concludes as matters of law that:

“1. The failure and neglect of the mortgagee, Budget Finance Plan, Incorporated, or any one on its behalf, to offer said chattel mortgage for registration with the Division of Registration of the Department of Motor Vehicles of the State of California until more than thirty days after the date of the execution of said chattel mortgage was an unreasonable delay and that, as a consequence of said unreasonable delay said chattel mortgage became, and now is, void as against all creditors of the bankrupt who became creditors of said bankrupt prior to the date said chattel mortgage was offered for registration with the Division of Regis-

tration of the Department [39] of Motor Vehicles of the State of California and that said petition for reclamation should be denied and the order to show cause based thereon discharged, and

“2. Because counsel for the mortgagee stated in open court that the delay in recording said chattel mortgage in Alameda County, State of California, until June 14, 1947, was an unreasonable delay after the date of the execution thereof, the effect of said last mentioned delay has become, and now is, moot.

“It Hereby Is Ordered that the petition for reclamation filed herein by and/or in behalf of Budget Finance Plan, Incorporated, be, and it is, Denied, and the order to show cause be, and it is, Discharged, all without prejudice, however, to said Budget Finance Plan, Incorporated, to file an unsecured claim herein, in such amount as it may be advised.

“Dated July 31, 1947.

“BURTON J. WYMAN,

“Referee in Bankruptcy.”

Subsequently, and on August 9, 1947, the following verified petition for review was filed herein:

“The petition of Budget Finance Plan, Inc., a corporation, respectfully represents and shows:

“1. That your petitioner is a creditor of Buddie Jerome Hayner, bankrupt herein, and claims as security a chattel mortgage on certain motor vehicles and equipment.

“2. That heretofore, on the 15th day of July, 1947, petitioner filed its Petition for Reclamation, verified July 14, 1947, to recover possession of said motor vehicles and equipment from the Trustee herein, and an Order to Show Cause was duly issued thereon.

“3. That thereafter, on July 22nd, 1947, the said matter came on regularly for hearing on the said Petition for Reclamation, Order to Show Cause, and Answer of Trustee. [40]

“4. That thereafter and on the 31st day of July, 1947, the said Referee did make Findings of Fact, Opinion, Conclusions of Law, and an Order thereon; that the said Order is as follows:

“It Is Hereby Ordered that the petition for reclamation filed herein by and/or in behalf of Budget Finance Plan, Incorporated, be, and it is, Denied, and the order to show cause be, and it is, Discharged, all without prejudice, however, to said Budget Finance Plan, Incorporated, to file an unsecured claim herein, in such amount as it may be advised.

“Dated July 31, 1947.

“BURTON J. WYMAN,

“Referee in Bankruptcy.

5. The said Order is erroneous for the following reasons:

“a. That the said Order and the opinion supporting it are against law.

“b. That the findings of fact and conclusions of law upon which said order is based are not supported by and are inconsistent with the evidence herein.

“c. That the findings of fact do not support and are inconsistent with the opinion, conclusions of law and order herein.

“d. That the said Order does not follow the rule laid down by the Court in *In re Mercury Engineering, Inc.*, 68 Fed. Sup. 376 (D.C., S.D., Calif., Central Div.).

“e. That the findings of fact fail to find on a material issue, in this, that the evidence shows without contradiction that the delay in filing the chattel mortgage with the Department of Motor Vehicles, if any, was due to the failure of the said Department of Motor Vehicles to issue certificates of registration, and through no fault of petitioner.

“f. That the findings of fact fail to find on a material issue, in this, that the evidence shows without contradiction that the transfer of legal ownership in said motor vehicles occurred between Universal CIT Corporation, Bank of Berkeley, and Bank of Pinole, the then legal owners, and petitioner, and not from the [41] bankrupt; that there was therefore no transfer of interest in the motor vehicles from bankrupt to petitioner except the excess, if any, over the interests of said transferees in the total sum of \$4,024.30.

“g. That the findings of fact fail to find on a material issue, in this, that the evidence shows without contradiction that the total value of said

motor vehicles is the sum of \$4,000.00, and that the unpaid balance due petitioner is in excess of \$4,700.00.

“h. That findings of fact 4, and conclusions of law 1, insofar as they find or hold that the delay, if any, was unreasonable and that therefore the chattel mortgage is void are contrary to the law and the evidence, and that the record shows that the delay in registering the said chattel mortgage with the Department of Motor Vehicles, if any, was a reasonable one.

“Wherefore, your petitioner prays for a review of said order by the Judge, and that the said order be vacated and set aside.

“Dated August 9, 1947.

“BUDGET FINANCE
PLAN, INC.,

“Petitioner.

“By C. H. AHRENS,

“Vice Pres. of

Said Corporation.

“STANLEY M. McLEOD,

“CARROLL F. JACOBY,

“Attorneys for Petitioner.”

[Verification omitted for sake of brevity.]

Papers Handed Up Herewith

I hand up herewith, as a part of this certificate and report, the following papers:

1. Petition for Reclamation;

2. Order to show cause on Petition for Reclamation;
3. Trustee's Answer to Petition for Reclamation and Order to Show Cause;
4. Petitioner's Opening Brief on Petition for Reclamation;
5. Trustee's Memorandum in Opposition to Petition for Reclamation, etc.;
6. Petitioner's Reply Brief; [42]
7. Order Denying Petition for Reclamation, etc.;
8. Petition for Review of Referee's Order Denying Petition for Reclamation, etc.;
9. Reporter's Transcript relative to Petition for Reclamation, and
10. Envelope containing Exhibits Offered and Received in Evidence.

Dated October 27, 1947.

Respectfully submitted,

/s/ BURTON J. WYMAN,

Referee in Bankruptcy.

[Endorsed]: Filed Oct. 27, 1947. [43]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of
the United States District Court for the Northern
District of California, held at the Court Room
thereof, in the City and County of San Francisco,

on Monday, the 10th day of November, in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

ORDER APPROVING REFEREE'S CERTIFICATE ON PETITION FOR REVIEW

This matter came on regularly this day for hearing on Referee's certificate on petition for review. After hearing the arguments of Mr. Margolis and Mr. McLeod, it is Ordered that the Referee's certificate be and the same is hereby approved. [44]

[Title of District Court and Cause.]

ORDER CONFIRMING REFEREE'S ORDER

The petition of Budget Finance Plan, Incorporated, for review of Referee's Order denying petition for reclamation on behalf of said Budget Finance Plan, Incorporated, made and entered on July 31, 1947, having been heretofore heard and submitted, and being now fully considered, it is by the Court Ordered that the aforesaid Order, Judgment and Decree of the Referee, be, and the same hereby is, Confirmed.

Dated November 17, 1947.

MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed Nov. 17, 1947. [45]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Budget Finance Plan, a corporation, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the Order of the United States District Court for the Northern District of California, Southern Division, dated November 10 and 17, 1947, and entered November 17, 1947, confirming the Order of Referee in Bankruptcy Burton J. Wyman, dated July 31, 1947, denying appellant's petition for reclamation and discharging Order to Show Cause thereon and holding chattel mortgage on motor vehicles void as to creditors of the bankrupt, and appeal is taken from the whole thereof.

Dated this 10th day of December, 1947.

CARROLL F. JACOBY,
Attorney for Budget Finance
Plan, a Corporation,
Appellant.

[Endorsed]: Filed Dec. 10, 1947. [46]

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS
TO BE URGED UPON APPEAL

To John O. England, Trustee in the above entitled proceeding, and Max H. Margolis, Esq., his attorney:

You and Each of You will please take notice, under the provisions of Rule 75 of the Rules of Civil Procedure for the United States District Court, that the Appellant, Budget Finance Plan, a corporation, intends to rely upon the following points in its appeal to the Ninth Circuit Court of Appeals from the Order of the above entitled Court dated November 10 and 17, 1947, confirming the Order of the Referee in Bankruptcy denying appellant's petition for reclamation: [47]

I.

That the District Court in its Order of November 10 and 17, 1947, erred in confirming the Order of Burton J. Wyman, Referee in Bankruptcy, dated July 31, 1947, denying appellant's petition for reclamation.

II.

That the District Court in its said Order erred confirming findings of fact 4 of said Order of Burton J. Wyman, Referee, in that said findings of fact are clearly erroneous, are not supported by the evidence, and are contrary to law.

III.

That the District Court in its said Order erred in confirming findings of fact 5 of said Order of Burton J. Wyman, Referee, in that said findings of fact are clearly erroneous, are not supported by the evidence, and are contrary to law.

IV.

That the District Court in its said Order erred in confirming conclusions of law 1 of said Order of Burton J. Wyman, Referee, in that said conclusions of law are clearly erroneous, are not supported by the evidence, and are contrary to law.

V.

That the District Court in its said Order erred in confirming said Order of Burton J. Wyman, Referee, in that said Order fails to find on a material issue in this, that the evidence shows without contradiction that the transfer of legal ownership in said motor vehicles sought to be recovered by appellant in its petition for reclamation occurred between Universal C.T. Corporation, Bank of Berkeley, and Bank of Pinole, the then legal owners, and Budget Finance Plan, a corporation, and not from the bankrupt; that there was no transfer of interest in the motor vehicles from bankrupt to petitioner since the vehicles do not and did not exceed in value the amounts of the liens held by said transferees. [48]

VI.

That the District Court in its said Order erred in confirming said Order of Burton J. Wyman, Referee, in that said Order of Burton J. Wyman, Referee, is clearly erroneous and contrary to the law and the evidence insofar as it finds or holds that the delay, if any, in offering the chattel mortgage for registration with the Department of Motor Vehicles was or is unreasonable, and is clearly erroneous and contrary to the law and the evidence insofar as it holds or finds that the chattel mortgage on the motor vehicles at any time was, or now is, invalid or void for any reason.

VII.

That by virtue of the transfer of legal ownership in the motor vehicles from Universal CIT Corporation, Bank of Berkeley, and Bank of Pinole, to Budget Finance Plan, a corporation, appellant, appellant acquired an interest therein not dependent upon a transfer from the bankrupt, and that therefore the District Court in its said Order erred in confirming the said Order of Burton J. Wyman, Referee, denying petition for reclamation, and said Orders are clearly erroneous and contrary to law in that they fail to recognize or give effect to said transfers and said legal ownership of Budget Finance Plan.

Dated this 10th day of December, 1947.

/s/ CARROLL F. JACOBY,
Attorney for Budget Finance Plan, a Corporation,
Appellant.

Receipt of a copy of Appellant's Statement of Points to Be Urged on Appeal is acknowledged this 10th day of December, 1947.

/s/ MAX H. MARGOLIS,
Attorney for Trustee.

[Endorsed]: Filed Dec. 10, 1947. [49]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Budget Finance Plan, a corporation, having filed its Notice of Appeal to the Ninth Circuit Court of Appeals from the Order of District Court dated November 10 and 17, 1947, files this, its designation of Contents of the Record on Appeal and does designate the following portions of the record, proceedings and evidence to be contained in the Record on Appeal herein, to-wit:

I.

Petition for Reclamation of Budget Finance Plan, a corporation, for reclamation of mortgaged property.

II.

Order to Show Cause on Petition for Reclamation.

III.

Trustee's Answer to Petition (of Budget Finance Plan) for Reclamation and Order to Show Cause.

IV.

Transcript of testimony of hearings before Burton J. Wyman, Referee in Bankruptcy, on Tuesday, July 22, 1947, and exhibits.

V.

Findings of Fact, Opinion, Conclusions of Law, and Order Denying Petition for Reclamation Filed Herein on Behalf of Budget Finance Plan, Incorporated, of Burton J. Wyman, Referee in Bankruptcy, dated July 31, 1947. (See pages 22 to 24 inclusive, Certificate and Report of Referee dated October 27, 1947.)

VI.

Petition for Review of Referee's Order Denying Petition for Reclamation on Behalf of Budget Finance Plan, Inc. (See pages 24 to 26 inclusive, Certificate and Report of Referee dated October 27, 1947.)

VII.

Order of District Court dated November 10 and 17, 1947, confirming order of Burton J. Wyman, Referee in Bankruptcy, dated July 31, 1947, denying petition for reclamation of Budget Finance Plan, a corporation.

VIII.

Certificate and Report of Referee in Bankruptcy dated October 27, 1947.

IX.

Notice of Appeal dated December 10, 1947.

X.

Appellant's Statement of Points to be urged on appeal.

Dated this 10th day of December, 1947.

/s/ CARROLL F. JACOBY,
Attorney for Budget Finance Plan, a Corporation,
Appellant.

Receipt of copy of the foregoing Designation of Record on Appeal is acknowledged this 10th day of December, 1947.

/s/ MAX H. MARGOLIS,
Attorney for Trustee.

[Endorsed]: Filed Dec. 10, 1947. [51]

[Title of District Court and Cause.]

APPELLEE'S DESIGNATION OF ADDI-
TIONAL PORTIONS OF THE RECORD
ON APPEAL UNDER RULE 75(a)

To the Above-Entitled Court, and to C. W. Calbreath, Esq., Clerk of Said Court, and to Carroll F. Jacoby, Attorney for Appellant, Budget Finance Plan, a Corporation:

Comes now John O. England, Trustee of the estate of Buddie Jerome Hayner, bankrupt above-

named, Appellee herein, and in accordance with Rule 75(a) of the Federal Rules of Civil Procedure and designates the following as the portions of the record, proceedings and evidence to be contained in the Record on Appeal, notice of which said appeal has heretofore been filed by said appellant on the 10th day of December, 1947, as follows:

1. The entire Certificate and Report of Referee on Petition for Review of Referee's Order Denying Petition for Reclamation on Behalf of Budget Finance Plan, Incorporated, pages 1 through 27 inclusive; and
2. Item No. 10 Envelope containing Exhibits Offered and Received in Evidence which appears on page 27 of the aforesaid item No. 1, namely, the Certificate and Report of Referee, etc., containing claimant's Exhibits No. 1, 2, 3 and 4.
3. This designation of additional portions of the Record on Appeal dated December 18, 1947.

Respectfully submitted,
MAX H. MARGOLIS,
Attorney for Trustee-
Appellee.

[Endorsed]: Filed Dec. 18. 1947. [52]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellant herein may have to and including February 28, 1948, to file the Record of Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated January 19, 1948.

LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed Jan. 19, 1948.

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 53 pages, numbered from 1 to 53, inclusive, contain a full, true, and correct transcript of the records and proceedings in the Matter of Buddie Jerome Hayner, Bankrupt, No. 36787-R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on

appeal is the sum of \$8.60 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 13th day of February, A. D. 1948.

[Seal] C. W. CALBREATH,
 Clerk,
 /s/ E. H. NORMAN,
 Deputy Clerk.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 36787-R

In the Matter of
BUDDIE JEROME HAYNER,
Bankrupt.

PETITION IN RECLAMATION
(Budget Finance Company)

Tuesday, July 22, 1947, 2:00 P.M.

Appearances:

For the Trustee: Max H. Margolis, Esq.

For the Petitioner in Reclamation: Stanley McLeod, Esq., and Carroll F. Jacoby, Esq.

For the Bankrupt: Henderson R. Wallace, Esq.,
Representing Messrs. Wallace & Parker. [1*)

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

The Referee: Matter of Buddie Jerome Hayner.

Mr. Wallace: Ready, your Honor.

Mr. Margolis: There is a petition on file, is that correct? A petition in reclamation?

Mr. McLeod: An order of examination.

The referee: Let's take up the petition in reclamation and dispose of that.

Mr. Margolis: Yes.

The Referee: Let's dispose of that.

Mr. McLeod: If your Honor please, this is a petition in reclamation filed by The Budget Finance Plan, Incorporated, and is based upon a chattel mortgage, which was executed by the bankrupt to the claimant for the sum of \$5,000, and which mortgage covers certain machinery and personal property, equipment, as well as two automobile trucks and one automobile. I think the mortgage can be distinctly separated as to the personal property and the vehicles, because the mortgage, which I will prove by the proper testimony—I notice that the Trustee, on information and belief, denied all the allegations—but the mortgage was executed on the 18th of February, 1947, and after notice of intention had been recorded setting the date of consummation as February 26th, 1947. The chattel mortgage was not recorded in the office of the County Recorder of Alameda County until some time in June, June 14, 1947. I think the facts there speak for themselves.

The Referee: Are you willing to concede the mortgage is [2] void?

Mr. McLeod: I can see no alternative.

The Referee: That mortgage, then, is out of the way.

Mr. McLeod: On the personal property.

The Referee: Yes.

Mr. McLeod: However, as to the mortgage upon the motor vehicles, a certified copy of the mortgage was forwarded to the Division of Registration of the Department of Motor Vehicles on March 21, 1947, and I should like to put on a representative of the claimant to verify the facts.

The Referee: Very well.

CHARLES H. AHRENS

produced as a witness for the Petitioner; sworn.

The Referee: What is your name?

A. Charles H. Ahrens.

Direct Examination

By Mr. McLeod:

Q. Mr. Ahrens, you are an officer of the Budget Finance Plan, Incorporated?

A. That is right.

Q. What is your title? A. Vice-president.

Q. Are you familiar with a transaction between your company and the bankrupt, Mr. Hayner?

A. I am.

Q. Will you kindly state the facts of the transaction?

A. Do you want me to refer to dates in the matter, sir?

(Testimony of Charles H. Ahrens.)

Q. If you will. Do you want this for reference?

A. The Oakland office of our organization advanced a loan to Mr. Hayner under date of February 18, 1947, in the amount of [3] \$5,000, the purpose of which was to pay off three separate loans on the vehicles he owned at that particular time.

Q. Will you kindly state what those loans were and the name of the holders thereof?

A. At that time one of the vehicles was encumbered by the Bank of Pinole in the amount of \$807.10; on another, he was obligated to the Universal C.I.T. in the amount of \$929; then, on a 1946 Buick, to the Bank of Berkeley in the sum of \$2,288.20. There was a total lien against these three vehicles of \$4,024.30. He applied for a refinancing of the indebtedness plus an additional amount of cash for use in his business. He offered as security for the loan, the three vehicles and what personal property in the nature of equipment and machinery he had in the 20th Century Fixture Company, of which I understood he was the sole owner.

Mr. McLeod: I might say, for the benefit of your Honor and Counsel, that due to the late date of the recordation of the original mortgage, it has not yet been returned to the claimant and I would like to ask Mr. Ahrens——

Q. There is attached to your petition a copy of the purported chattel mortgage and promissory note. Is that a correct and true copy of the original?

(Testimony of Charles H. Ahrens.)

Mr. Margolis: I object to that, your Honor, on the ground that no proper foundation has been laid. Did the witness prepare it? Was it prepared under his direct supervision? Was he in the office? I think the foundation should be laid before he can ask him whether it is a correct copy. [4]

The Referee: I think that is correct.

Q. (By Mr. McLeod): Mr. Ahrens—

A. I might support that this way, of course, it is not the fact stated. Nevertheless, it is a matter of policy that our papers are made with an original and three copies. I mean, taking a matter up that way, carbons are inserted between the original and the three copies. This one represents one of the copies. The original is white; this is blue for file purposes; the yellow is used for filing with the Department of Motor Vehicles and the pink one goes to the customer?

Q. Is that executed at the same time?

A. Oh, yes. You will find the signatures are carbon copies of the signatures on the original. In other words, the carbons were not removed at the time the original was executed. They are signed by the person obtaining loans and the necessary witnesses while the carbons are in between the various copies. I believe, beyond a reasonable doubt, it would be a true and correct copy of the mortgage.

Mr. McLeod: If that is not satisfactory to Counsel, I will reserve that and put the bankrupt on the stand to prove his own signature.

(Testimony of Charles H. Ahrens.)

Mr. Margolis: This is an adversary proceeding. We have an Answer here. It is a matter of some importance to the Trustee and the creditors and to the Court, I assume. Did you have anything to do with the preparation of this, Mr. Ahrens?

A. No, sir. [5]

Mr. Margolis: I think he ought to establish it, then, your Honor.

The Referee: Let's take the testimony of this witness and then see what the other testimony is.

Q. (By Mr. McLeod): Now, Mr. Ahrens, what action was taken on the execution of this chattel mortgage?

Mr. Margolis: I object to the question—I beg your pardon. I thought you were finished.

Q. (By Mr. McLeod): What action was taken by your company upon the execution and delivery of this chattel mortgage and promissory note?

A. Will you elaborate on that a little? Exactly what do you mean?

The Referee: Read the question.

A. Exactly what do you mean?

Q. (By Mr. McLeod): What I want to know is, did you take the chattel mortgage and promissory note and then file it away, or what did you do with it?

A. Well, the chattel mortgage was taken in return for the moneys advanced, and it is a matter of policy of the company to record the original chattel mortgage and send carbon copies of the

(Testimony of Charles H. Ahrens.)

chattel mortgage to the Department of Motor Vehicles, showing our interest in the vehicles in the Department of Motor Vehicles at Sacramento.

Mr. Margolis: I move that the answer be stricken on the grounds that it is not responsive. The question was: What was done; was it filed by the company, your Honor. [6]

The Referee: The answer may go out. Read the question to the witness.

(Question read by the reporter.)

A. I can best answer that, of course, not being present at the office at the time this particular thing occurred, but I know as far as the records indicate in the office that——

Mr. Margolis: I object to the answer, your Honor.

Q. (By Mr. McLeod): Are those records kept under your supervision, under your control, Mr. Ahrens?

A. Not necessarily under my control, no, sir. They are part of the office records available to me or anyone, at any time, that might be interested.

Q. Mr. Ahrens, as far as the motor vehicles were concerned, did you obtain from anyone, the pink certificates of ownership of the vehicles?

A. Yes, we received them from the respective places that were paid off.

Q. You mean?

A. The Bank of Pinole, the Universal C.I.T. and the Bank of Berkeley.

(Testimony of Charles H. Ahrens.)

Q. And did you also obtain the white certificates of registration?

A. We did not obtain the white certificates for a considerable time after the completion of the loan, because the white certificates at the time the loan was made, were in transit to Sacramento. That was during the month of February. They were in transit to Sacramento for the 1947 licenses and had not been returned from Sacramento. They are used [7] as a receipt for application for the current year license.

Q. Now, upon obtaining the pink certificates, what action did you take then?

Mr. Margolis: I am going to object to that question, your Honor, upon the ground that no proper foundation has been laid, assuming something not in evidence. The question is what the witness did. He testified a minute ago that he was not there; the files were open to inspection.

The Witness: That is right.

Mr. Margolis: I think the question here should be directed to the witness, in trying to prove the petitioner's case here, what he did, what he knows about the transaction, not what someone else did, your Honor.

The Witness: I can say this: I personally——

Mr. Margolis: I object to a voluntary statement, your Honor. There is no question pending. There is a question pending to which I made an objection. I submit the objection.

(Testimony of Charles H. Ahrens.)

The Referee: What is the question?

(Question read by the Reporter.)

Q. (By the Referee): Did you obtain the pink certificates yourself?

A. No, sir. When we come to a point of objection, sir——

The Referee: Wait a minute. You have Counsel who can make objections. The objection is sustained.

Mr. Margolis: That is the very point to which the objection is directed, your Honor. [8]

The Witness: Actually——

Mr. Margolis: I am going to object to the voluntary statements of the witness, your Honor.

The Referee: Wait until Counsel asks a question. You may answer after that.

Q. (By Mr. McLeod): Mr. Ahrens, did you send the certificates to Sacramento yourself?

A. No.

Q. Did you personally have any communication from the Division of Registration with respect to the purported chattel mortgage?

A. I, no sir, but the office, which records I have, from the Department of Motor Vehicles, it is here, sent back to the office on the matter of the loan.

Q. Can you testify the letter you are referring to was received by your company?

Mr. Margolis: To which question I am going to object on the ground that it is incompetent, irrelevant and immaterial and no foundation has been laid.

(Testimony of Charles H. Ahrens.)

Mr. McLeod: Mr. Margolis, I hope you don't want me to bring——

The Referee: I don't know what the communication is; I cannot rule on it.

Mr. Margolis: It would seem to me, your Honor, that the testimony to be elicited here—again, I don't want to prove the petitioner's case—is where this document came from, where it was found. I am not trying to circumscribe the petitioner in establishing his case here. [9]

Mr. McLeod: Well, Counsel will concede that the bankrupt has scheduled the Budget Finance Corporation as a secured creditor, the holder of a promissory note, secured by a chattel mortgage upon the vehicles described in our petition.

Mr. Margolis: That is what the schedules show. The Trustee is not bound by the schedules.

Mr. McLeod: May I take my witness off and put Mr. Hayner on the stand for the purpose of proving a few of these fundamental facts?

The Referee: Very well.

(Witness excused.)

BUDDIE JEROME HAYNER

produced as a witness for the Petitioner; sworn.

Direct Examination

By Mr. McLeod:

Q. Mr. Hayner, in February, 1947, did you have any business transactions with the Budget Finance Plan, Incorporated? A. Yes.

(Testimony of Buddie Jerome Hayner.)

Q. What was it?

A. In regards to a loan.

Q. State the details of the loan.

A. I went to the Budget Finance Company and asked them to lend me a sum of money, which they did, for improvements of my business.

Q. I show you a document entitled "Statement of Loan to Budget Finance Plan" and ask you if you can identify it as your signature?

A. It is.

Mr. McLeod: I ask that this be introduced as Claimant's [10] Exhibit No. 1.

The Referee: The Claimant's Exhibit No. 1.

(The document referred to was received in evidence as Claimant's Exhibit No. 1.)

Mr. Margolis: "Petitioner," your Honor.

The Referee: I am just adopting Mr. McLeod's language.

Q. (By Mr. McLeod): Now, Mr. Hayner, I show you a duplicate chattel mortgage and promissory note dated February 18, 1947, purported to be executed by yourself to the Budget Finance Plan and ask you if that is your signature?

A. Yes, it is my signature, a copy of my signature.

Q. Now, you executed this signature?

The Referee: When you say "copy," you mean a carbon copy? A. A carbon copy.

Q. (By Mr. McLeod): You executed that at the time of the original? A. Yes.

(Testimony of Buddie Jerome Hayner.)

Mr. McLeod: May this go in as the Claimant's Exhibit?

(The document referred to was received in evidence as Claimant's Exhibit No. 2.)

Q. (By Mr. McLeod: Mr. Hayner, at the time of the execution of the chattel mortgage and promissory note, did you receive any consideration therefor from the Budget Finance Plan?

A. By consideration, what do you mean?

Q. (By the Referee): Did you receive any money?

A. Yes, I received the sum of \$900 and some odd.

Q. (By Mr. McLeod): What disposition was made of the difference [11] between \$900 and \$5,000?

A. The difference between the \$900 and \$5,000 was money paid off on debts of mine on two trucks and one automobile and a personal loan.

Q. Now, I show you three documents entitled, "Authorization for Pay-off" dated February 18, 1947, and ask if that is your signature on each of those? A. Yes, sir.

Q. Now, these authorizations to pay off indicated that the one addressed to the Bank of Berkeley, Berkeley, California, directed them to accept from the Budget Plan Company \$2,228.20, being the balance due on your accounts to the Bank on a 1946 Buick? A. Yes.

(Testimony of Buddie Jerome Hayner.)

Q. And a second one to the Universal C.I.T. Credit Corporation, 1440 Broadway, directing them also to accept from the Budget Finance Plan \$929, on a 1941 Ford truck; the final one is to The Bank of Pinole at Crockett, California, directing them to accept from the Budget Finance Plan the sum of \$807.10 due on a 1941 Ford.

Mr. McLeod: May these go in as the Claimant's Exhibit?

The Referee: Number 3, as one Exhibit.

(The three documents referred to were received in evidence as Claimant's Exhibit No. 3.)

Q. (By Mr. McLeod): Mr. Hayner, were the two banks and the Universal C.I.T. the legal owners of those trucks?

Mr. Margolis: I object——

Mr. McLeod: I just want to save time.

Q. Did they hold any security for the indebtedness reflected on these authorizations? [12]

A. The Bank of Pinole advanced the cash \$550 to me for payroll. They had no security outside of my note and the automobile and trucks were with the Standard Finance. One-third down was required by law and I financed the rest.

Q. Did you hold the pink slips on these vehicles?

A. No, I did not.

Q. Who did?

A. At the time, I assume the banks did.

Q. They were holding them as security for these indebtednesses? A. Yes.

(Testimony of Buddie Jerome Hayner.)

Q. Had you ever been the legal owner of any of these vehicles? A. No.

Q. Were you the registered owner?

A. The registered owner.

Q. In February, at the time you executed this chattel mortgage and promissory note, did you have the white registration slips? A. No.

Q. Where were they, if you know.

A. They were in transit to the Motor Vehicle Department.

Q. Had you sent them there?

A. I believe I turned them in when I made application for license plates.

Q. You were not able, then, to give the white slips to the Budget Finance Plan? A. No.

Q. Now, did you make payments of any sum to the Budget Finance Plan on this mortgage and note?

A. I made one payment, one full payment, and I made another payment on the interest [13] because I could not meet the second payment.

Q. The second one?

A. The second payment I was not able to meet, so I made a payment on interest. I paid the interest that month on the amount of the note.

Q. You paid one full installment?

A. I paid one full installment.

Q. And then you paid the interest?

A. On the second.

Q. On the second? A. Yes.

(Testimony of Buddie Jerome Hayner.)

Q. Do you recall what the two sums totaled?

A. \$300 some on one, on the regular payment for the note, which there is a record of. On the other I paid \$92, \$98, something like that.

Mr. McLeod: That is all.

Cross-Examination

By Mr. Margolis:

Q. Did you execute any other documents down there at the office of the Budget Finance Company when you signed this note and chattel mortgage, Mr. Hayner? A. Not to my knowledge.

Q. This is the only document you executed, nothing else?

Mr. McLeod: He evidently, Mr. Margolis, executed the three requests to the Finance Companies also.

Mr. Margolis: Perhaps he misunderstood me.

Q. Are these your signatures on these yellow tags which Counsel offered as Claimant's Exhibit No. 3? A. Yes. I see what you mean.

Q. And this signature on Claimant's Exhibit No. 1, is that [14] your signature?

A. Yes, my signature.

Q. Did you execute any other documents, other than the three exhibits just shown you, down in the office of the Budget Finance Company when you made this loan?

A. Not at that time, but I was called back in

(Testimony of Buddie Jerome Hayner.)

after they received the white slips, sometime after the loan was made, to sign the white slips so they could be sent down with the pink slips so they could register the cars with the Budget Finance Company as legal owners, approximately two months after.

Q. Did the white slips come to you or go right to the Budget Finance Company?

A. The white slips came to me. I took them and showed them to them. They still had the pinks. They had not sent the pinks up yet, or something, I don't know what the mix-up was. I signed the white slips then and turned them over to Mr. Burnett of the Budget Finance. He, in turn, sent them along with the pinks to register them as legal owners.

Q. The Ford Stake Truck and the Chevrolet Stake Truck were kept where? With relation to your operation over there in Oakland, were they kept on the premises?

A. The Ford truck was kept on the premises and Mr. Green might have used the Chevrolet to and from home.

Q. I see. After the day's work the Ford was stored there with the rest of these miscellaneous items?

A. Yes, usually. Once in a while it was used.

Mr. Margolis: I have no further questions. [15]

(Testimony of Buddie Jerome Hayner.)

Redirect Examination

Mr. McLeod: I would like to ask another.

Q. (By Mr. McLeod): Mr. Hayner, do I understand you to say you got the white slips back from Sacramento and then sent them over to the Budget Finance Company, gave them to the Budget Finance? A. Yes.

Q. Do you recall when you got them back from Sacramento?

A. No, I don't recall. I do know it was after the time the loan was negotiated; how long after, I don't remember, but it was some time?

Q. A month?

A. I think it was around that, a month, a month and a half, possibly two months.

Q. As soon as you received them, did you immediately take them to the Budget Finance?

A. I think it was two or three days until I got around to doing it. Then I went in and took care of it.

Mr. McLeod: That is all.

The Referee: That is all.

(Witness excused.)

Mr. McLeod: Will you take the stand, Mr. Ahrens?

CHARLES H. AHRENS

having been previously sworn, recalled.

Direct Examination
(Resumed)

By Mr. McLeod:

Q. Mr. Ahrens: I show you a letter from the Division of Registration, Department of Motor Vehicles, Sacramento, California, dated April 17, 1947, addressed to Budget [16] Finance Plan, 419 14th Street, Oakland, California, and I ask you if you have ever seen this letter before?

A. I have.

Q. Where did you see it?

A. I obtained it from the files the office carries on that account.

Q. Was it a part of the file relating to the bankrupt's loan? A. Yes.

Q. Do you know when it was received by your company?

A. No, not specifically, sir. I know it was dated April 17, and mailed from Sacramento on April 17, addressed to the Budget Finance Plan in Oakland. So, it was sometime after April 17. Usually it takes one day to come from Sacramento to Oakland.

Mr. McLeod: I ask that this be introduced in evidence as the Claimant's No. 4.

The Referee: Claimant's Exhibit No. 4.

(The letter referred to was received in evidence as Claimant's Exhibit No. 4.)

(Testimony of Charles H. Ahrens.)

Q. (By Mr. McLeod): Mr. Ahrens, is the bankrupt at the present time indebted to your company?

A. Yes.

Q. In what sum?

A. I don't have the exact figure here. I furnished you with the figures. Oh, yes, I do. I made a note of it. The principal sum of \$4,787.10, with interest due from April 26, 1947. That is \$4,787.10 plus interest from April 26, this year.

Q. Mr. Ahrens, are you familiar with the re-sale value of used automobiles? A. Reasonably so.

Q. Are you familiar with the type and make of automobiles set forth in the chattel mortgage, set forth in this matter? A. I am.

Q. You are aware that there is involved a 1941 Ford Stake Truck and a 1941 Chevrolet Stake Truck and a 1946 Buick, four-door sedan, are you not?

A. That is right.

Q. Do you have an opinion as to the present market value of all of those vehicles?

Mr. Margolis: To which question I object on the ground that no proper foundation has been laid. The witness has not been qualified as an expert. His answer to the first question was, that he has an opinion, but there is no basis for the opinion.

Mr. McLeod: I believe, your Honor, he said he was familiar with the values of used automobiles.

The Referee: That is his statement.

Mr. Margolis: If that is sufficient, I will withdraw the objection.

The Referee: You can question him.

(Testimony of Charles H. Ahrens.)

Mr. Margolis: Does your Honor want me to question him?

The Referee: I am not saying I want you to. I am saying you have the opportunity to.

Mr. Margolis: I did not want to interrupt the normal procedure.

Q. (By Mr. McLeod): Can you tell the Court, Mr. Ahrens, what, in your opinion, is the market value of the 1941 Stake Truck, [18] the subject of this mortgage?

A. I would say about—the Ford?

Q. Yes.

A. I would say, in the neighborhood of \$800 or \$900.

Q. Can you tell the Court, in your opinion, what is the market value of the 1941 Chevrolet Stake Truck?

Mr. Margolis: I will interpose an objection to that, if your Honor please, on the ground that it is incompetent, irrelevant and immaterial. The petitioner here claims to be the owner of the purported chattels. As such, I cannot see what the relevancy of the value of the chattels has. He does not claim the goods or their value. He claims the particular items themselves.

Mr. McLeod: It is alleged in the petition, if your Honor please, that the value here is less than the full amount of the claim; hence, there would be no equity if the petition is correct. We can establish their value here in that regard to be less than the value set forth in the petition.

(Testimony of Charles H. Ahrens.)

The Referee: I will allow it.

The Witness: Approximately the same value.

Q. (By Mr. McLeod): Would you put that value in figures? A. Between \$800 and \$900.

Q. That is for the Chevrolet Truck?

A. Yes.

Q. And can you tell the Court, please, the value, in your opinion, of the 1946 Buick automobile?

A. Between \$2,000 and \$2,200.

Mr. McLeod: No further questions, your Honor.

Cross-Examination

By Mr. Margolis:

Q. When did you last see the 1941 Ford Stake Truck, Mr. Ahrens?

A. About 12 o'clock today.

Q. You saw it at 12 o'clock today.

A. Yes, sir.

Q. Where was it located?

A. On Harrison near 16th in Oakland.

Q. And under what circumstances did you see it, just today at 12 o'clock?

A. It happens to be in a parking lot that I park my car in.

Q. Did you examine it with some particularity?

A. No, sir.

Q. Can you tell us upon what basis you say its approximate value is between \$800 and \$900?

A. It is my occupation to make loans on motor vehicles in California; it has been for a period of some 17 or 18 years. Naturally, I would be

(Testimony of Charles H. Ahrens.)

familiar with the market values of all motor vehicles as used as security and the biggest per cent of all business we do in the State of California.

Q. And did you turn the motor over today?

A. No, sir.

Q. When did you last see it in operation?

A. So far as I can recall, June the 28th.

Q. What were the circumstances on that date when you saw it?

A. June 28th or 29th. It was brought in from the place that the bankrupt apparently had left it or moved to out at Walnut Creek.

Q. When did you last see the 1941 Chevrolet Truck? A. I have not seen it. [20]

Q. You have never seen it? A. No, sir.

Q. Then the basis of your estimated value of \$800 or \$900 could be taken from what?

A. Taken from the experienced opinion of the personnel of our San Francisco office.

Q. No independent knowledge of your own by way of observation? A. No, sir.

Q. You don't know whether it is newly or freshly painted, whether there is a new motor in it, or not? A. To swear to, no, sir.

Q. When did you last see the 1946 Buick Sedan?

A. I did not personally see it, no.

Q. You have never seen it? A. No.

Q. The price of \$2,000 or \$2,400, you have taken from what?

A. Taken from the opinion of the personnel I have in the San Francisco office, who have seen it.

(Testimony of Charles H. Ahrens.)

Q. Not your own opinion? A. No, sir.

Q. You would not know whether it was freshly painted? A. No, sir.

Q. You would not know whether it has had a motor tune-up or not? A. No.

Q. Would it make any difference in the price of the car if those things were done to the car? In other words, freshly painted, a motor clean-up?

A. I think so.

Q. Now, you got the basis for the figure which you gave the Court here from outside information, not your own, in these two instances?

A. In the instances of those [21] two, yes.

Q. Now, do you know whether that file shows any other documents than those introduced in evidence, Mr. Ahrens, other than these documents, referring to them by number, Claimant's Exhibit No. 1, the Budget Finance Plan; Petitioner's Exhibit No. 2, or Claimant's Exhibit No. 2, the Chattel Mortgage and Promissory Note; these three authorizations to pay-off, which represent Claimant's Exhibit No. 3, and this printed form of letter from the Motor Vehicle Department, dated April 17, 1947, addressed to the Budget Finance Company, Claimant's Exhibit No. 4? Was anything else in the file relating to this transaction?

A. An application for credit.

Q. Any correspondence of any kind with the Motor Vehicle Department?

A. Yes, the letter of transmittal.

(Testimony of Charles H. Ahrens.)

Q. Where is that letter?

A. I believe the attorney has it.

Mr. Jacoby: I don't think I have the letter of transmittal.

The Witness: I believe in response to this letter requesting that we send the last issued registration cards.

Q. (By Mr. Margolis): Can you tell whether any correspondence was had with Sacramento which antedated Claimant's Exhibit No. 4, which you have in your hand? A. Sir?

Q. Any correspondence, letters or telegram, which antedated the receipt by your company of this letter of April 17th?

A. On March 21, 1947, there is a carbon copy of an advice to the Department of Motor Vehicles at Sacramento. [22]

Q. Yes?

A. That we have attached a certified copy of the chattel mortgage and the titles to such chattel mortgage to the Motor Vehicle Department along with the necessary fees, which I believe they acknowledged, yes.

Q. Where is the copy of that letter?

A. In the Oakland office.

Q. Did you bring that along with you?

A. I doubt it. I could not say positively, but it is the common practice of our office to send more than one. We just list one after the other, rather than write a separate, distinct instrument on each transmittal we make.

(Testimony of Charles H. Ahrens.)

Q. And the date of this transmittal was?

A. March 21.

Q. You saw that this morning?

A. Not this morning, but I have seen it.

Q. And your letter of transmittal is dated March 21, 1947, and covered the transaction with which we are here concerned? A. That is right.

Q. Can you tell us any reason for waiting from February 18th to March 21st before sending the transmittal with the necessary papers to Sacramento?

A. Yes, because Mr. Hayner did not have the registration slips and in order to complete the due filing with the Department of Motor Vehicles, they require that you have accompanying the chattels, the ownership certificates and also the registration certificates before they will complete the recordation of it.

Q. You already had, on February 18, 1947, in your office—if you don't know of your own knowledge, please tell us—the [23] checks made payable to the Pinole Bank and the Berkeley Bank and the Universal C.I.T. Credit Corporation, did you not? A. Yes.

Q. You had the pinks in your possession on February 18, 1947, or the day after, did you not?

Mr. McLeod: He has not so testified, Counsel.

A. I don't know what date we had the pinks, sir. We merely made the transaction on February 18, 1947.

(Testimony of Charles H. Ahrens.)

Mr. Margolis: Yes?

A. Drew up the contract and mailed, presumably the checks to these respective companies, attached to an original of these authorizations, requesting them to accept the money and send us titles to the vehicles.

Q. When did you receive the titles to the vehicles from the people you just enumerated?

A. I don't know.

Q. Does your file show it?

A. No, I don't think so.

Q. Would the cancellation of your checks going to those three people you have enumerated refresh your memory if you could tell the dates from the cancellation stamps?

A. That would tell us what time our bank honored the checks; that is all.

Q. I mean with relation to your receipt of the ownership certificates?

A. No, I have no means of knowing what the actual date was the office received these particular certificates.

Q. Would there be anything in your files to indicate what date they were received?

A. I doubt it very much. We [24] have no reason to make a record as to when we receive certificates from a company. We would pay a loan off, make records, oh, of various natures, not of that.

(Testimony of Charles H. Ahrens.)

Q. You don't affix any file stamp to the letter of transmittal?

A. Not in that case. We do with the check-off when received from the Department of Motor Vehicles; not from anyone else.

Q. Were there any letters accompanying the pink ownership certificates from the three persons to whom you made the pay-offs, received by your company? A. I don't know.

Q. You don't know anything about it?

A. No.

Q. Would you know whether your file indicated that?

A. If it does, I am positive Counsel has all the file connected with the transaction except the letter of the original transmission to the Department of Motor Vehicles of the pink slips. It is our usual practice not to save those things for any purpose whatsoever. The fact that we pay off, if the company sends the pink slip, the check serves the purpose. We have no reason for keeping merely a form letter, you might say, as usually attached, "We send in return for the money received." There is no point in keeping it.

Q. Now, there was a notice of intention to mortgage this property executed by the petitioner?

A. There was.

Q. You have a copy, or the original with you?

A. I think there is a copy there of the publication.

(Testimony of Charles H. Ahrens.)

Q. And you say that oftentimes you wait before you send the pink ownership certificates to Sacramento?

A. Especially do we do that in the months of February and March. It is necessary, in the State of California, that a motor vehicle registrant send in, I think the first Monday of February, somewhere around the 5th or 6th, he must send in an application for the current year's tax by that date or be fined a substantial figure. In making loans, during that period of time, why, it is common practice to complete them when we obtain the ownership certificate and await the disposition of the Department of Motor Vehicles in Sacramento to send back the current registration before we go through the mechanics of sending up a chattel mortgage and title, because of the fact that it just duplicates the work. We have to do the same thing all the time.

Q. In other words, you wait until you get a batch together and send up?

A. And we also wait for the registration certificates. The usual practice in an office—we all have a way of doing business—in our office, the practice is that every week or ten days we send up all we have acquired that are completed.

Q. That accumulated between the week or ten days period?

A. That is right.

Q. That condition prevailed with respect to this transaction?

A. Beg pardon, sir?

Q. That condition prevailed with respect to this transaction?

A. I would assume so.

Mr. Margolis: I have no further questions, your Honor.

Mr. McLeod: No further questions. [26]

If your Honor please, in view of the fact that Mr. Margolis evidently is going to require more than we can prove by this witness, we would like the matter continued one day if possible.

The Referee: What do you want to prove?

Mr. McLeod: I want to prove the date of mailing, although I think Counsel has done a good job of doing that.

The Referee: Don't you allege the 21st?

Mr. McLeod: We allege the 21st.

The Referee: I am satisfied it was the 21st of March.

Mr. Margolis: I am satisfied it was the 21st of March.

Mr. McLeod: All right. I don't have to produce somebody to prove that.

If I may say a few words, now. The whole thing depends on the delay in recordation. In this instance, we feel it is because of the well-known condition of Sacramento's Motor Vehicle Department, and the further fact, as Mr. Hayner has testified, that the white slips which are required by the Department to be transmitted to them when the mortgage is executed or a transfer made, were in Sacramento. It was an impossibility for the Budget Finance Plan to comply with Section 95 of the Motor Vehicle Act, which requires that a certified copy of the chattel mortgage and the white registration slips be sent.

The Referee: Wasn't that more the fault of the creditors? Wouldn't that be the fault of the Finance Company?

Mr. McLeod: I don't see how it could be the fault of the [27] Finance Company. The Finance Company is helpless because the State was moving very slowly during the Spring period. Those white slips, I don't think even a power gun could get them at that time.

The Referee: Why did they make the loan then?

Mr. McLeod: That, your Honor, I cannot answer.

The Referee: Is it not, therefore, their fault, rather than the fault of the creditors? They cannot pin it on the Motor Vehicle Department, because, under the testimony of the witness, he knew that condition existed, at that time.

Mr. McLeod: Of course, as far as the creditors being made to suffer to any extent by the delay, factually they would not; technically they would not, but actually and factually they would not, of course, because there were liens on these automobiles.

The Referee: We are bound by the law anyway.

Mr. McLeod: I concede that, Your Honor.

The Referee: They were only warned to look out for these other liens, that is true. What about this other situation?

Mr. McLeod: Well, here we have less than 30 days.

The Referee: I can remember cases within ten days.

Mr. McLeod: I know one of fourteen. That was not on an automobile; they did not have Sacramento.

The Referee: I think that is something the Finance Company has to protect itself on, and, under the testimony of this witness, they held them up in batches. I have heard [28] that story before.

Mr. McLeod: I know there is very little I can bring in that you have not heard before.

Mr. Jacoby: May I say this, if Your Honor please, the reason I am speaking myself is because of the remark you made about the Finance Company making the loan under the circumstances. I think Your Honor will have to concede that the Finance Company is in the business of making loans and must do so throughout the year.

The Referee: They must do so at their peril if they don't comply with the law.

Mr. Jacoby: I think the record shows they did comply with the law. I am referring to the letter of the Motor Vehicle Department, that they always do wait for the white slips. They never send the mortgage and the pink before they receive the white slips, because the delay would become undue; the Motor Vehicle Department would say: "We cannot accept, because we still cannot accept because you have not the whites."

The Referee: I don't think that excuses them. I think that makes them more culpable.

Mr. Jacoby: If Your Honor's reasoning is accurate, I say in their defense, a Finance Company, in the present conditions, would be barred from

making an automobile loan between January and April or May. That I know. I know I did not get my registration certificate for two or three months, or my plates for four months. [29]

The Referee: They know that condition. That is why they should be more careful when creditors may become involved. There is your trouble. I think you are just as reprehensible here as you were with reference to the other property. The delay was a little longer there. I see you have over 30 days.

Mr. Jacoby: There is a 30 day delay, but, was that unreasonable when the factual matter is here?

The Referee: I am willing to give Counsel a chance to brief this and show me wherein I can conscientiously do other than I have in mind right now.

Mr. Margolis: I would like to call the Court's attention to one interesting situation here with reference to Claimant's Exhibit No. 4, which I assume is in response to that of March 21st. My inquiry of the witness was what antedated the document of April 17th. It is the fact that was sent on March 21st. Then, they send this letter back that they require the registration card. Now, the transaction was consummated on about February 18th. I would say good conscience would demand that it would be sent up on the 19th or the 20th.

Mr. Jacoby: They cannot complete a transaction because of the Motor Vehicle Department.

The Referee: If they are so anxious to make the loan and want to take the chance, if they don't comply with the law, it strikes me it is their look-out.

Mr. Jacoby: Our thought, talking first legally, if Your Honor please, is that they want to do everything they are [30] obligated to do; they did not complete it. As a matter of fact, in this situation, the estate will gain by the mortgage and the chattels, because of the reason that we cannot deny the delay so far as the machinery and equipment are concerned. They refinanced these loans which were loans made with other institutions. In addition, they gave the bankrupt cash in the sum of \$900. Now, I haven't any intention of criticizing that Your Honor is correct, that the Finance Company cannot lend under these conditions except at its peril, which is what Your Honor's theory would imply. That is going to be a serious condition existing.

The Referee: I have had this here so many times before, particularly on this holding up, sending up in batches. I don't know how many I have declared void since this recordation of chattel mortgages went into effect.

Mr. Jacoby: I would concede Your Honor's point on that, except one thing is material in this situation.

The Referee: It is one of the instances which shows possibly, that is why some of the delay was caused.

Mr. Jacoby: I don't think the record will bear that out, Your Honor, for this reason, the letter from the Motor Vehicle Department shows that at that time papers were sent in and as yet the white slips have not been received.

The Referee: But, it was not sent until after more than 30 days after the transaction was technically closed.

Mr. Jacoby: That is correct, Your Honor, but it was still [31] inoperative so far as the Motor Vehicle Department, because the white slips had not been received, as the record shows.

The Referee: If this company were some individual, not used to doing business, there might be something said about the reasonableness. Here is a company doing this constantly and knows that these conditions come up.

Mr. Jacoby: I think there, Your Honor, the answer works either way around.

The Referee: I don't think so. I think it is just the reverse.

Mr. Jacoby: Well, the company does business and knows the Department of Motor Vehicles will not accept incomplete papers, that is papers without the white slips, actually, because of their experience they would be bound to wait until they get the white slips or the Department comes back and says: "Your record is not complete."

The Referee: They went ahead on this loan, between the time, apparently, without any regard for the law, at least the law made by the decisions. I am willing, if you can give me cases, I am not going to shut you off.

Mr. Jacoby: We will appreciate that opportunity, Your Honor.

The Referee: How many days do you want? I don't want too long, because I am going away on the 1st. I will give you 2-2-1.

(Submitted 2-2-1.) [32]

[Endorsed]: No. 11856. United States Circuit Court of Appeals for the Ninth Circuit. Budget Finance Plan, Inc., a corporation, Appellant, vs. John O. England, etc., Trustee of Estate of Buddie Jerome Hayner, bankrupt, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed February 13, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
Ninth Judicial Circuit

No. 11856

In the Matter of

BUDDIE JEROME HAYNER,

Bankrupt.

STATEMENT OF POINTS ON APPEAL AND
A DESIGNATION OF RECORD ON
APPEAL

Appellant, Budget Finance Plan, a corporation, hereby adopts as its points on appeal its statement of points on appeal appearing in the transcript of the record herein, and appellant intends to rely on said points on appeal.

Appellant designates for printing the entire transcript as certified to the above Court on appeal from the District Court, Southern Division, Northern District of California.

Dated this 20th day of February, 1948.

/s/ CARROLL F. JACOBY,

Attorney for Budget Finance Plan, a Corporation,
Appellant.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Feb. 20, 1948.

[Title of Circuit Court of Appeals and Cause.]

APPLICATION AND ORDER FOR TRANSMISSION OF EXHIBITS WITHOUT REPRODUCTION

Appellant moves the above entitled Court that Exhibits 1, 2, 3 and 4, herein be considered in their usual form and without the necessity of reproduction upon the ground that the said exhibits are substantially referred to in the transcript of record and that therefore said exhibits are, in said original form, of material but limited importance on appeal.

Dated this 24th day of February, 1948.

/s/ CARROLL F. JACOBY,
Attorney for Appellant.

ORDER

It Is Hereby Ordered that Exhibits 1, 2, 3 and 4 herein be considered by this Court in their usual and original form without the necessity of reproduction.

Dated this 26th day of February, 1948.

/s/ FRANCIS A. GARRECHT,
Judge of the United States
Circuit Court.

[Endorsed]: Filed Feb. 25, 1948.

No. 11,856

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

BUDGET FINANCE PLAN, INC.,
a corporation,

Appellant.

vs.

JOHN O. ENGLAND, etc., Trustee of
Estate of Buddie Jerome Hayner,
bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF.

CARROLL F. JACOBY,
1029 Hearst Building, San Francisco, California,
Attorney for Appellant.

FILED

APR 28 1948

PAUL P. O'BRIEN,

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BUDGET FINANCE PLAN, INC.,
a corporation,

Appellant,

vs.

JOHN O. ENGLAND, etc., Trustee of
Estate of Buddie Jerome Hayner,
bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the District Court of the United States for the Northern District of California, Southern Division. The said order is set forth in the record herein. (R. p. 54.)

Appellant, Budget Finance Plan, Inc., is a corporation organized and existing under and by virtue of the laws of the State of California, and authorized to do business therein. Appellee, John O. England, is Trustee of the Estate of Buddie Jerome Hayner, bankrupt, in the matter of said bankruptcy proceedings pending before said District Court.

The action arises out of the petition for reclamation of appellant (R. pp. 2-6) and order to show cause (R. pp. 6 and 7) instituted to recover from said Trustee certain chattels theretofore hypothecated by said Buddie Jerome Hayner, hereinafter called bankrupt, to secure his promissory note to appellant, certain of which chattels, consisting of three motor vehicles, were, at the time of filing said petition, of a value less than the balance of \$4,787.10 then due on said note, said value being in the aggregate not in excess of \$4,200.00. (R. pp. 83-85.)

Said petition for reclamation was filed July 15, 1947. Appellee as Trustee filed his answer July 17, 1947. After hearing duly and regularly had the Referee made and filed his order denying petition for reclamation on July 31, 1947. (R. pp. 9-12.)

On August 9, 1947, pursuant to the provisions of Title 11, Section 67, U.S.C., appellant filed its petition for review. (R. pp. 13-16.) On October 27, 1947, Referee filed his certificate and report on petition for review. (R. pp. 17-53.)

The petition was heard before the District Court November 10, 1947, and said Court made its order confirming Referee's order denying petition for reclamation (R. p. 54) on November 17, 1947. Under authority of Judicial Code, Title 28, U.S.C., Section 225, and Bankruptcy Code, Title 11, U.S.C., Sections 47 and 48, appeal was taken to this Court to review the said order of the Court below, notice of appeal filed December 10, 1947. (R. p. 55.) On January 19, 1948,

the District Court extended the time for filing the record on appeal to February 28, 1948. (R. p. 63.) This appeal and the transcript of record were filed and docketed in this Court on February 13, 1948.

STATEMENT OF THE CASE.

(a) Nature of the Case.

On February 18, 1947, bankrupt executed his certain promissory note in the principal sum of \$5,000.00, secured by a chattel mortgage of the same date, to appellant. The said mortgage covered certain machinery and equipment, together with three motor vehicles, to-wit: a 1941 Ford truck, a 1940 Chevrolet truck, and a 1946 Buick sedan. (Exhibit No. 2.)

At the time of the transaction the said vehicle stood respectively in the names of the Universal CIT Corporation, Bank of Pinole, and Bank of Berkeley, as legal owners, as that term is defined in Section 67, Vehicle Code, State of California, which is as follows:

“Legal Owner. ‘Legal owner is a person holding the legal title to a vehicle under a conditional sale contract, the mortgagee of a vehicle. * * *’”

(R. p. 76.) The bankrupt was never at any time legal owner of said vehicles, or any of them. (R. p. 77.) Title was so held as security for obligations of the bankrupt in the total sum of \$4,024.30 on said date. (R. p. 67.) Of the sum of \$5,000.00 loaned by appellant to bankrupt, the said sum of \$4,024.30, on written authorization of the bankrupt, was paid by appellant

directly to said legal owners. (Exhibit No. 3, R. p. 76.) Sometime thereafter, the exact date being unknown, (R. p. 88) appellant received said legal titles from the former holders thereof, or "pink slips" as they are commonly known, and on March 21, 1947, forwarded to the Department of Motor Vehicles, Sacramento, a certified copy of said chattel mortgage, necessary fees, and certificates of ownership. (R. p. 87.)

At the date of execution of the mortgage, and for about two months thereafter, the certificates of registration were in the possession of the Department of Motor Vehicles on bankrupt's application for registration for the year 1947. (R. pp. 77, 79.)

On April 17, 1947, the Department of Motor Vehicles, Sacramento, advised appellant by letter that the department was *holding* said certified copy of chattel mortgage, certificates of ownership, and fees for the reason that: "We require Registration card last issued." (Exhibit No. 4.)

On May 17, 1947, bankrupt filed in said District Court his voluntary petition in bankruptcy and was adjudicated a bankrupt on May 19, 1947. Thereafter, and prior to filing appellant's petition for reclamation said trustee took possession of said motor vehicles. By stipulation of counsel for the parties hereto, filed in said bankruptcy proceedings, the said motor vehicles have been sold and the proceeds impounded pending final determination of said Referee's order denying petition for reclamation.

(b) Issues Presented.

On the basis of the foregoing facts the Referee found that the said mortgage was executed on February 18, 1947, and offered for registration on March 21, 1947. The Referee further found that the said mortgage was not offered for registration within a reasonable time after its execution and was and is therefore void against all creditors who became such prior to the date of registration, and as a conclusion of law held that the failure to offer said mortgage for registration until said date aforesaid was an unreasonable delay, and that said mortgage is void as to creditors as aforesaid. (R. pp. 10-12.)

Appellant raises no issue as to the machinery or equipment included in said chattel mortgage, and has heretofore abandoned claim thereto. (R. p. 12.)

Based upon the foregoing statement of the nature of the case and summary of facts, the issues presented are:

1. Whether the said chattel mortgage on the motor vehicles is valid as against the creditors regardless of when they became creditors, said mortgage having been executed on February 18, 1947, and forwarded to the Department of Motor Vehicles on March 21, 1947, because of unavoidable delay in obtaining registration certificates.

2. Whether a refinancing mortgage comes within the intendment of Sections 195 and 196 of the Vehicle Code of the State of California.

STATUTES INVOLVED.

Section 195, Vehicle Code, State of California:

“No chattel mortgage on any vehicle registered hereunder irrespective of whether such registration was effected prior or subsequent to the execution of such mortgage, is valid as against creditors or subsequent purchasers, or encumbrancers until the mortgagee or his successor or assignee has deposited with the department, at its office in Sacramento, a copy of said mortgage with an attached certificate of a notary public stating that the same is a true and correct copy of the original, accompanied by a properly endorsed certificate of ownership to the vehicle described in said mortgage if said vehicle is then registered hereunder, or if said vehicle is not so registered, by an application in usual form for an original registration, together with an application for registration as legal owner, and upon payment of the fees as provided in this code.”

Section 196, Vehicle Code, State of California:

“When the chattel mortgagee, his successor or assignee, has deposited with the department a copy of the chattel mortgage as provided in section 195 hereof, such deposit constitutes constructive notice of said mortgage and its contents to creditors and subsequent purchasers and encumbrancers but such mortgaged vehicle shall be subject to a lien as provided in Division VIII hereof.”

SPECIFICATION OF ERRORS.

1. The District Court erred in confirming Referee's Order Denying Petition For Reclamation.

2. The District Court erred in confirming findings of fact 4 of said order in that said findings of fact are not supported by the evidence and are contrary to law, as set forth in argument herein.

3. The District Court erred in confirming findings of fact 5 of said order in that said findings of fact are not supported by the evidence and are contrary to law, as set forth in argument herein.

4. The District Court erred in confirming conclusions of law 1 of said order in that said conclusions of law are not supported by the evidence and are contrary to law, as set forth in argument herein.

5. The District Court erred in confirming said order in that said order is clearly erroneous and contrary to the evidence insofar as it finds or holds that the delay, if any, in offering the chattel mortgage for registration with the Department of Motor Vehicles was or is unreasonable, or finds or holds that the chattel mortgage on said motor vehicles was or is invalid or void for any reason.

6. The District Court erred in not making its order reversing said Order Denying Petition for Reclamation and directing appellee to deliver possession of said motor vehicles to appellant free and clear of claims of creditors of said bankrupt.

ARGUMENT.

In presenting its argument appellant believes that all the facts essential thereto have been summarized, with appropriate references to the transcript of record in its statement of the case and, therefore, in the interest of brevity, will rely upon such statement of facts except where further detail requires specific references. It should be noted that the original exhibits are before this Court in their usual form. (R. p. 100.)

I.**THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDING THAT THE MORTGAGE IS INVALID OR VOID AS TO CREDITORS BECAUSE OF DELAY IN REGISTRATION.**

Appellant held the chattel mortgage in its office after the 18th of February for the sole reason that it was conscious of the fact that the motor vehicle department would not accept the same for registration in the absence of the certificates of registration which were out of appellant's control. Mr. Ahrens, an officer of appellant, so testified (R. p. 88). That he was correct in this assumption is borne out by the letter of the motor vehicle department written *after* appellant had forwarded all available documents specified in Sections 195 and 196, Vehicle Code of California, in which the department stated they were *holding* the mortgage and accompanying matter awaiting the registration certificates. Since these were not received by appellant until after March 21,

1947, it is apparent that for appellant to have forwarded the documents in its possession at an earlier date would have been equally unavailing. (Exhibit No. 4.)

This conduct on the part of appellant, if it be a delay, is excusable delay, as the authorities of this Circuit so hold.

The rule is stated in *In re Mercury Engineering, Inc.*, 68 Fed. Sup. 376 (D. C. S. D. Cal.) at page 380: that the requirement of prompt recording is satisfied "only if the recording is done promptly, unless such recording is impractical *or the circumstances of the case warrant delay.*" (Italics ours.)

In the *Mercury* case the mortgagee withheld recordation 26 days for purposes of his own convenience. The Court there recognized that the mortgage *could have been recorded at the time of its execution*, but held that it was proper for the mortgagee, in the exercise of *good business sense* and sound legal principles, and for reasons of his own, to withhold it from recordation for the time which, in that instance, the mortgagee chose.

Where the delay arising out of matters of the mortgagee's convenience is not a sufficient basis for declaring the mortgage invalid, it must follow that, as a matter of law, a delay imposed upon appellant by circumstances over which it had neither power nor control is such delay as the circumstances of the case warrant, and the requirement of prompt recording has in this instance been fully satisfied.

A recent decision in this Circuit, *Citizens National Trust and Savings Bank of Los Angeles v. Gardner*, 161 Fed. 2d 530, cites the *Mercury* case with approval on the point here involved. The facts of the case strongly resemble those before this Court insofar as the question of delay of recordation is concerned. In that case the mortgagee appealed from an adverse decision of the Bankruptcy Court, affirmed by the District Court, declaring void a chattel mortgage on the grounds, among others, that mortgagee was guilty of an unreasonable delay in registration of the chattel mortgage with the department of motor vehicles. Chronologically, the mortgage was executed May 4, 1945, and deposited in escrow the same date. On May 19, the escrow was closed and the mortgage delivered to appellant. The mortgage was recorded with the County Recorder on the 24th, but delivery of the certificates of ownership of the vehicles, or "pink slips", was not accomplished until June 3 or 4, 1945. The reason for this delay was the fact that the said certificates were in the department of motor vehicles to complete transfer of ownership to the mortgagors which would enable them in turn to transfer legal title to the mortgagee. Appellant in that case forwarded the certificates of title and a copy of the mortgage to the department of motor vehicles on June 8, 1945. Thereafter the mortgagors were adjudicated bankrupts and the trustee instituted said action for the recovery of said vehicles as stated.

In reversing the order of the District Court the Circuit Court held that the evidence was *not* suf-

ficient to support the finding that appellant failed to act promptly in depositing the chattel mortgage with the department of motor vehicles. Although the escrow was closed and appellant received the chattel mortgage on May 19, since the certificates of ownership were not received by the mortgagee until June 3 or 4, the Court stated, at page 533, that it was not until the latter date that "appellant was in a position to comply with the requirements of said section," and that, as to the fact that the certificates were forwarded on June 8: "We think this constituted sufficiently prompt action".

Since the delays of 26 days in the *Mercury* case and 20 days in the *Gardner* case were properly construed as reasonable it is obvious that the determining factor is not the *period* but rather the *cause* of the delay which is determinative of the question whether or not in any particular instance the mortgage is valid as to creditors despite a delay in recordation. Thus it cannot be said that in the instant case the delay in and of itself was an unreasonable one.

It should be noted that appellant's mortgage involved the refinancing of prior liens on said vehicles in an amount representing the major portion of the loan to bankrupt. Having in mind, therefore, that legal title to the vehicles stood of record in persons other than the bankrupt, appellant, in temporarily withholding registration of the chattel mortgage awaiting receipt of the certificates of registration, would be justified in assuming that the possibility of

prejudice to creditors, encumbrancers or purchasers thereby would be nonexistent.

This factor, coupled with the stated requirements of the Department of Motor Vehicles as set forth in its letter of April 17 (Exhibit No. 4) demonstrating that until the certificates of registration were delivered the department would do no more than "hold" the chattel mortgage, establishes conclusively that appellant did not delay beyond a reasonable time. Appellant was fully cognizant of the requirements of the department and Mr. Ahrens, one of its officers, testified (R. 88):

"Q. Can you tell us any reason for waiting from February 18th to March 21st before sending the transmittal with the necessary papers to Sacramento?

A. Yes, because Mr. Hayner did not have the registration slips and in order to complete the due filing with the Department of Motor Vehicles, they require that you have accompanying the chattels, the ownership certificates and also the registration certificates before they will complete the final recordation of it."

Appellant's position is a stronger one than that of the mortgagee in the *Mercury* case, and certainly no less sound than that of the mortgagee in the *Gardner* case. It must necessarily follow that there is not sufficient evidence to sustain the finding that appellant's mortgage is invalid or that appellant failed to register the same within a reasonable time.

II.

REFINANCING MORTGAGE SHOULD BE HELD SAME AS PURCHASE MORTGAGE IN RESPECT TO RECORDING STATUTES.

The California State Courts have construed the general chattel mortgage recording statute, Section 2957, Civil Code of California, in *pari materia* with Section 3440 of the Civil Code, as requiring recordation as a substitute for change of possession, *Ruggles v. Cannedy*, 127 Cal. 290. It is also a matter of judicial decision that the requirements of Section 2957, Civil Code, find their equivalent as to motor vehicle mortgages in Section 195, Vehicle Code, *Bank of America v. Sampsell*, 114 Fed. 2d 211.

In the *Mercury* case, at page 379, the Court states that the object of the recording statutes is to protect creditors against surreptitious sale or incumbrance, but finds an exception in regard to the application of Civil Code Section 3440 to a purchase money mortgage insofar as the requirement of notice of intention to mortgage is concerned, holding that a purchase money mortgage is not within the intentment of the act. The Court reasons:

“But when the incumbrance is to secure moneys which represented the price for these assets, the reason for the requirement disappears. For to hold that the seller who, instead of receiving cash, acquires a mortgage on property which he transfers to a buyer, must subordinate his rights to this buyer’s other creditors, is to penalize him for supplying to the buyer the very means of carrying on his trade”.

The *Gardner* case cites the *Mercury* decision with approval and in following the rule states, at page 533:

“We do not consider the question of whether the mortgage is a true purchase money mortgage is controlling. The determining factor is whether aid is extended in acquiring rather than in disposing of assets”.

Insofar as the loan in the instant case was for the purpose of and did effect a refinancing of the encumbrances on the motor vehicles the transaction was a granting of *aid* in *preserving* rather than disposing of assets, and the mortgage falls in the same category as a purchase money mortgage. Thus, as stated in the *Mercury* case, “the reason for the requirement (of the recording statute) disappears”. In no sense could appellant’s mortgage constitute a secret lien, regardless of registration, since legal title to the vehicle was *never at any time* in the bankrupt.

At best, the bankrupt had but a limited interest in the vehicles when the mortgage was executed. Appellant acquired legal title from sources other than the bankrupt and in fact it would have been possible for appellant to have acquired the interests of the third parties holding said legal titles *without the consent of the bankrupt*. Section 183, Vehicle Code of California, provides:

“A legal owner may assign his title or interest in or to a vehicle registered hereunder to a person other than the owner without the consent of and without affecting the interest of such owner.

* * *”

Under all of these circumstances it would appear that appellant's mortgage is beyond the intendment of Vehicle Code Section 195 in the same sense that a purchase money mortgage is outside the intendment of Civil Code Section 3440, and that therefore said mortgage is valid as to creditors regardless of when their claims arose.

CONCLUSION.

It is respectfully urged that Order of the District Court confirming the Order of the Referee in Bankruptcy denying appellant's petition for reclamation be reversed, and that by appropriate order the said chattel mortgage be declared valid and the Trustee in Bankruptcy be directed to deliver the impounded funds, held in substitution for said motor vehicles, to appellant free and clear of the claims of said bankrupt or his creditors.

Dated, San Francisco, California,

April 19, 1948.

Respectfully submitted,

CARROLL F. JACOBY,

Attorney for Appellant.



No. 11,856

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BUDGET FINANCE PLAN, INC.,
Appellant,

vs.

JOHN O. ENGLAND, etc., Trustee of
Estate of Buddie Jerome Hayner,
bankrupt,
Appellee.

BRIEF FOR APPELLEE.

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FILED

JUN 1 - 1946

PAUL P. O'BRIEN,

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No. 11,856

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BUDGET FINANCE PLAN, INC.,

Appellant,

VS.

JOHN O. ENGLAND, etc., Trustee of
Estate of Buddie Jerome Hayner,
bankrupt,

Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF JURISDICTION.

The proceedings originated in a petition for reclamation of personal property filed by appellant with the referee in bankruptcy on July 15, 1947. (R. 2-7.) The referee had jurisdiction. (11 U.S.C.A., sec. 66.) An order denying the petition was made and entered by the referee on July 31, 1947 (R. 9-12), and petition for review thereof by the District Court was filed by appellant on August 9, 1947 (R. 13-16). The District Court had jurisdiction. (11 U.S.C.A., sec. 67 (c).) It confirmed the order of the referee on November 17, 1947. (R. 54.) Notice of appeal therefrom to this court was filed by appellant on December

10, 1947. (R. 55.) This court has jurisdiction to review the order in question. (11 U.S.C.A., secs. 47, 48.)

STATEMENT OF THE CASE.

In the petition for reclamation filed with the referee on July 15, 1947, the appellant alleged that because of a chattel mortgage executed by the bankrupt in its favor on February 18, 1947, it was entitled to the immediate surrender of specifically described personal property, including three motor vehicles, then in the possession of appellee. (R. 2-5.) An order to show cause was issued returnable July 22, 1947. (R. 6-7.) Appellee's answer to the petition and order to show cause was a general denial and a special defense "That the chattel mortgage as alleged in said Petition for Reclamation is invalid as against the Trustee for the reason that it was not recorded as required by law". (R. 7-8.)

The matter was heard on July 22, 1947. (R. 64.) At the inception of the hearing the issues were narrowed by appellant abandoning some of its claims. Its counsel stated:

"Mr. McLeod: If your Honor please, this is a petition in reclamation filed by The Budget Finance Plan, Incorporated, and is based upon a chattel mortgage, which was executed by the bankrupt to the claimant for the sum of \$5,000, and which mortgage covers certain machinery and personal property, equipment, as well as two automobile trucks and one automobile. I think

the mortgage can be distinctly separated as to the personal property and the vehicles, because the mortgage, which I will prove by the proper testimony—I notice that the Trustee, on information and belief, denied all the allegations—but the mortgage was executed on the 18th of February, 1947, and after notice of intention had been recorded setting the date of consummation as February 26th, 1947. The chattel mortgage was not recorded in the office of the County Recorder of Alameda County until some time in June, June 14, 1947. I think the facts there speak for themselves.

The Referee: Are you willing to concede the mortgage is void?

Mr. McLeod: I can see no alternative.

The Referee: That mortgage, then, is out of the way.

Mr. McLeod: On the personal property.

The Referee: Yes.

Mr. McLeod: However, as to the mortgage upon the motor vehicles, a certified copy of the mortgage was forwarded to the Division of Registration of the Department of Motor Vehicles on March 21, 1947, and I should like to put on a representative of the claimant to verify the facts.

The Referee: Very well.” (R. 65-66.)

Evidence adduced at the hearing before the referee showed that the bankrupt executed the chattel mortgage on February 18, 1947, as security for a loan of \$5000 made by appellant. (R. 67, 74-75.) Upon the execution of the mortgage appellant paid part of the proceeds of the loan directly to the bankrupt. (R. 75.) It paid the balance of the proceeds of the loan

to three creditors of the bankrupt. (R. 67, 88.) Each of these creditors was registered as the legal owner of one of the involved vehicles, and each held the certificate of ownership (pink slip) as security for payment of an indebtedness by the bankrupt. (R. 70, 76.) The procedure followed by the appellant in paying the creditors was to mail each a check for the amount due with a request that the creditor endorse the certificate of ownership (pink slip) and mail it to the appellant. (R. 80.) While the record is uncertain as to the exact date or dates on which appellant received the certificates of ownership (pink slips), the fair inference therefrom is that appellant received them shortly after February 18, 1947. (R. 88-90.)

Evidence adduced at the hearing before the referee also showed that on March 21, 1947, appellant mailed to the department of motor vehicles, at its office in Sacramento, a copy of the said mortgage of February 18, 1947, with an attached certificate of a notary public stating the same to be a true and correct copy of the original, and the necessary fees. (R. 87.) But such evidence did not show, however, that *properly endorsed* certificates of ownership (pink slips) accompanied the copy of the mortgage thus mailed to the department of motor vehicles on March 21, 1947. (R. 87.) Other evidence in the record prompts a conclusion that the certificates of ownership (pink slips) remained in the possession of the appellant *for approximately two months after February 18, 1947*. In this connection, the bankrupt testified (R. 78-79):

“Q. Did you execute any other documents, other than the three exhibits just shown you, down in the office of the Budget Finance Company when you made this loan?

A. Not at that time, but I was called back in after they received the white slips, sometime after the loan was made, to sign the white slips so they could be sent down with the pink slips so they could register the cars with the Budget Finance Company as legal owners, approximately two months after.

Q. Did the white slips come to you or go right to the Budget Finance Company?

A. The white slips came to me. I took them and showed them to them. They still had the pinks. They had not sent the pinks up yet, or something. I don't know what the mixup was. I signed the white slips then and turned them over to Mr. Burnett of the Budget Finance. He, in turn, sent them along with the pinks to register them as legal owners.”

And in the same connection, the vice-president of the appellant testified (R. 91):

“Q. And you say that oftentimes you wait before you send the pink ownership certificates to Sacramento?

A. Especially do we do that in the months of February and March. It is necessary, in the State of California, that a motor vehicle registrant send in, I think the first Monday of February, somewhere around the 5th or 6th, he must send in an application for the current year's tax by that date or be fined a substantial figure. In making loans, during that period of time, why,

it is common practice to complete them when we obtain the ownership certificate and await the disposition of the Department of Motor Vehicles in Sacramento to send back the current registration before we go through the mechanics of sending up a chattel mortgage and title, because of the fact that it just duplicates the work. We have to do the same thing all the time.

Q. In other words, you wait until you get a batch together and send up?

A. And we also wait for the registration certificate. The usual practice in an office—we all have a way of doing business—in our office, the practice is that every week or ten days we sent up all we have acquired that are completed.

Q. That accumulated between the week or ten days period?

A. That is right. * * *

Q. That condition prevailed with respect to this transaction?

A. I would assume so.”

The referee made and entered his order denying the petition for reclamation on July 31, 1947. (R. 9-12.) He found and concluded that the chattel mortgage of February 18, 1947, was not offered for registration with the Division of Registration of Motor Vehicles of the State of California within a reasonable time after its execution and was void as to numerous creditors of the bankrupt. (R. 10-12.) His order was made “without prejudice, however, to said Budget Finance Plan, Incorporated, to file an unsecured claim herein, in such amount as it may be advised”. (R. 12.) His certificate and report on petition for review

by the District Court (R. 17-53) so completely answers the points urged by appellant that little more need be said by the appellee. The District Court approved the certificate and report on November 10, 1947, and made and entered an order confirming the referee's order on November 17, 1947. (R. 54.)

ARGUMENT OF THE CASE.

1. **THE EVIDENCE IS SUFFICIENT TO SUPPORT THE FINDING THAT THE MORTGAGE IS INVALID OR VOID AS TO CREDITORS BECAUSE OF DELAY IN REGISTRATION.**

Respecting chattel mortgage liens, the California Vehicle Code provides, in material parts, as follows:

“Section 195. Application for Chattel Mortgage. No chattel mortgage on any vehicle registered hereunder . . . is valid as against creditors . . . until the mortgagee . . . has deposited with the department, at its office in Sacramento, a copy of said mortgage with an attached certificate of a notary public stating that the same is a true and correct copy of the original, accompanied by a properly endorsed certificate of ownership to the vehicle described in said mortgage . . . together with an application for registration as legal owner, and upon payment of the fees as provided in this code.”

“Section 196. Registration Effective to Give Notice. When the chattel mortgagee . . . has deposited with the department a copy of the chattel mortgage as provided in section 195 hereof, such deposit constitutes constructive notice of said mortgage and its contents to creditors”

“Section 197. Registration as Legal Owner. Upon the deposit of any such chattel mortgage and application for registration and upon the payment of the fees as provided in this code, the department shall register the mortgagee . . . as legal owner in the manner provided for the registration of motor vehicles under the provisions of this act.”

“Section 198. Exclusive Method of Giving Notice. The method provided in this chapter for giving constructive notice of a chattel mortgage on a vehicle registered hereunder is exclusive and any such chattel mortgage is excepted from the provisions of sections 2957, 2959, 2965, and 2966 of the Civil Code.”

The record in the case is undisputed that the chattel mortgage was executed February 18, 1947; that the endorsed certificates of ownership (pink slips) were available to appellant for the asking on that date; and that the endorsed certificates of ownership (pink slips) were in fact delivered to appellant on or about that date. It is therefore obvious that from February 18, 1947, on, the appellant was in a position to comply with section 195 of the California Vehicle Code by depositing with the department of motor vehicles (1) an authenticated copy of the mortgage, (2) properly endorsed certificates of ownership (pink slips), (3) applications for registration of appellant as legal owner, and (4) the necessary fees.

And the record in the case is also undisputed that appellant made no attempt to comply with said section 195 earlier than March 21, 1947, to wit, more than

30 days after the chattel mortgage was executed. On March 21, 1947, according to the record, appellant mailed to the department an authenticated copy of the mortgage and the necessary fees. That, of course, was only part compliance with said section 195, for deposit of the properly endorsed certificates of ownership and applications for registration of appellant as legal owner were also required. And it appears from the record that approximately two months had elapsed after the execution of the chattel mortgage before appellant attempted to comply with these latter requirements.

Said section 195 is plain in its terms that no chattel mortgage on a motor vehicle is valid until all the requirements of the section are satisfied. This court interpreted the section in *Bank of America v. Sampsell*, 114 F. 2d 211, and affirmed an order of the district court confirming an order of a referee in bankruptcy declaring invalid a chattel mortgage on a number of automobiles of the bankrupt. A delay of five months in complying with said section 195 was involved. At page 212 the court said:

“The question presented is whether a delay in complying with the requirements of section 195 of the Vehicle Code rendered the mortgage invalid as against the trustee as the representative of creditors of the bankrupt who became such prior to the date of compliance. * * * The California courts have construed the general chattel recording statute (sec. 2957 of the Civil Code, not now applicable to motor vehicles) in pari materia with section 3440 of the Civil Code, as requiring

an immediate recording. Failure promptly to record renders the mortgage invalid as against all creditors who become such prior to the date of recording. *Ruggles v. Cannedy*, 127 Cal. 290; *Noyes v. Bank of Italy*, 206 Cal. 266. Such mortgage is, however, valid as between the parties thereto and as against creditors who become such subsequent to recording. Appellant concedes this, but contends that section 195 of the Vehicle Code enacts a different rule as to mortgages of motor vehicles, and that delay in filing such a mortgage does not affect its validity. The argument is based upon a difference in the wording of the two statutes, that is, upon a supposed difference in meaning between the word 'until', as used in section 195 of the Vehicle Code, and the word 'unless' as used in section 2957 of the Civil Code.

In effect, it would appear that the state courts have construed the word 'unless', as used in section 2957, as the equivalent of 'until', since a chattel mortgage, although not promptly recorded, is good as against creditors who become such subsequent to recording. See cases above cited. We are unable to discover a substantial difference in meaning between the two statutes. Giving effect to the rules announced in the decided state cases, it is fairly clear that the proper interpretation of section 195 of the Vehicle Code is that a mortgage on motor vehicles when it is not promptly recorded is void as to creditors, and as to subsequent purchasers and encumbrancers, whose interests arise prior to the date of compliance with the statute. This construction is in harmony with the declared policy of the state to secret liens. Calif. Civ. Code. sec. 3440; *Ruggles*

v. Cannedy, *supra*; Noyes v. Bank of Italy, *supra*; Washington Lumber & Millwork Co. v. McGuire, 213 Cal. 13. We are unable to agree with the holding in *In re Wiegand*, D. C. 27 F. Supp. 725, upon which appellant relies. The court there reached the mistaken conclusion that the words 'unless' and 'until', as used in these statutes, have essentially different meanings. Furthermore, it seems to have overlooked the fact that, in California, a creditor may attack his debtor's mortgage even though he is unable to perfect a lien until after the mortgage has been recorded or the mortgaged property has passed into the hands of the mortgagee. (Cases cited.)"

The above case was recently cited and approved in *Rolando v. Everett*, 72 Cal. App. 2d 629, 635, 165 P. 2d 33.

The holding of this court in *Swift v. Higgins*, 72 F. 2d 791, was that a chattel mortgage was rendered void as to a trustee in bankruptcy because of failure to record it until *twenty-eight* days after execution.

The holding of the District Court in the Southern District of California in *In re Hansen*, 268 F. 904, was that a chattel mortgage was rendered void as to a trustee in bankruptcy because of failure to record it until *forty days* after execution.

And the holding of the California court in *Williams v. Belling*, 76 Cal. App. 610, 245 P. 455, was that a chattel mortgage was rendered void as to creditors because of failure to record it until *fourteen days* after execution. At pages 615 and 616, the court said:

“In the instant case it might fairly have been inferred that fourteen days had elapsed between the delivery of the mortgage and its recordation. Such delay, although not affecting its validity between the parties (case cited), would, if not shown to be excusable, render the mortgage void as to creditors and encumbrancers whose claims were created during the interval (cases cited).”

Here the appellant failed to comply with section 195 of the Vehicle Code for *over thirty days* after execution of the chattel mortgage. Appellant seeks to excuse that delay on the plea that it could not comply with section 195 because it did not have possession or control of the *certificates of registration* (white slips) until after March 21, 1947. (AOB 8-9.) The excuse offered is unsound. The section does not require the deposit of a *certificate of registration* (white slip). It requires the deposit of a *certificate of ownership* (pink slip). Every motorist is familiar with the distinction between the two. It is enough to quote section 151 of the Vehicle Code:

“The department upon registering a vehicle shall issue a certificate of ownership to the legal owner and a registration card to the owner, or both to the owner if there is no legal owner of the vehicle.”

If a mortgagee has possession or control of a properly endorsed certificate of ownership (pink slip), then he is in a position to comply with section 195 and protect himself as well as the public, and non-compliance cannot possibly be excused by the fact

that he does not possess or control some other instrument, such as a *certificate of registration* (white slip), with which the section is not at all concerned.

Appellant cites *In re Mercury Engineering*, 68 F. Supp. 376, and *Citizens Nat. Trust & Savings Bank v. Gardner*, 161 F. 2d 530, as comparable cases supporting its excuse. (A.O.B. 9-12.) It is said by appellant that these cases tolerate respective delays of 26 days and 20 days. (A.O.B. 11.)

Appellant has read the *Mercury* case too hurriedly. The delay there tolerated was *two days* (Saturday to Monday), and not twenty-six days. At page 380 (68 F. Supp. 376), the following facts are recited:

“The claimant here, Arthur E. Barili, for a long time prior to June 26, 1943, owned and operated a machine shop at 722 North Broadway, Los Angeles, California. On that day he sold it as a going concern to Charles B. Taylor, who was acting not for himself, but as Trustee for Mercury Engineering Company, Incorporated, a corporation in the process of formation, for a total sum of \$16,000. Barili received \$5,000 in cash and the balance was to be evidenced by a promissory note in the sum of \$11,000 secured by a chattel mortgage upon the business, machinery and equipment sold. The chattel mortgage is undated, but was acknowledged on June 30th, and delivered to Barili. The company was formed on July 6th and thereafter the machine shop and business were transferred to the new corporation by Taylor, the Trustee. The corporation did not complete its organization

and start business until the week ending Saturday, July 4th. During the week, Barili remained at the place of business. The following Monday, July 26th, the chattel mortgage was recorded.”

It is very apparent from the above quotation, and confirmed by reference to a 1943 calendar, that the date “Saturday, July 4th” should read “Saturday, July 24th”. The *Mercury* case therefore reflects a holding that delay *from Saturday to Monday* in recording a chattel mortgage given by a corporation not organized until such Saturday, is not an unreasonable delay. Obviously, the factual situation in the *Mercury* case is not at all comparable with the factual situation in the present case.

Appellant has also read the *Gardner* case too hurriedly. The delay there tolerated was *five days*, and not twenty days. At page 533 (161 F.2d 530), this court said:

“As to the finding that appellant failed to act promptly or diligently in depositing a certified copy of the mortgage with the Department of Motor Vehicles, the stipulation discloses that while the escrow was closed on May 19, the ownership certificates of the three automobiles were not delivered to appellant until June 3 or 4. Under section 195 of the Vehicle Code, when the chattel mortgage is deposited with the Department, it must be ‘accompanied’ by the certificates of ownership. Thus it was not until June 3 or 4 that appellant was in a position to comply with the requirements of said section. It is fur-

ther stipulated that on June 8 appellant sent the endorsed certificates and a copy of the mortgage to the Department of Motor Vehicles. We think this constituted sufficiently prompt action.”

Again, obviously, the factual situation in the *Gardner* case is not at all comparable with the factual situation in the present case. There the mortgagee did not have possession or control of the certificates of ownership (pink slips), and was not in a position to comply with section 195, *until five days before it acted*. Here the appellant mortgagee had possession or control of the certificates of ownership (pink slips), and was in a position to comply with section 195, *for over thirty days before it acted*. Here the delay was not caused by any inability on the part of the appellant mortgagee to comply with the section, but was the voluntary product of its own preference to do business that way.

The facts and circumstances of the case therefore sustain the finding of the referee that the delay was inexcusable, and justify his order denying the petition for reclamation and the order of the district court confirming his order.

It was said in *In re Penfield Distilling Co.*, 6 Cir., 131 F. 2d 694, at page 694:

“Appellant pulls a heavy laboring oar. Findings of fact by a referee in bankruptcy, confirmed by the district judge, will not be set aside, on appeal, on anything less than a demonstration of plain mistake.”

2. REFINANCING MORTGAGES ARE NOT EXEMPTED FROM THE PROVISIONS OF THE CALIFORNIA VEHICLE CODE RESPECTING CHATTEL MORTGAGES.

Appellant's arguments to the contrary (A. O. B. 13-15) require little comment. Section 195 of the Vehicle Code expressly provides that "no chattel mortgage on any motor vehicle registered hereunder . . . is valid", unless the section is complied with. Therefore, where a motor vehicle is concerned, it may not be doubted that section 195 applies to all chattel mortgages, whatever their character may be.

Moreover, the appellant is unmindful that at the hearing before the referee its counsel conceded that its chattel mortgage was void, except to the extent that compliance with said section 195 may have saved it as to the motor vehicles. (R. 66.)

And, as pointed out by the referee in his discussion and opinion forming part of his certificate and report, "the validity of any of the purported prior liens never was before the court for determination; hence whether such purported liens were valid, or otherwise, never had to be determined by the court in this proceeding". (R. 46.)

CONCLUSION.

The appellee therefore respectfully submits that the order of the District Court, confirming the order of the Referee, should be affirmed.

Dated, San Francisco,
May 25, 1948.

MAX H. MARGOLIS,
Attorney for Appellee.

No. 11,856

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

BUDGET FINANCE PLAN, INC.,
Appellant,

VS.

JOHN O. ENGLAND, etc., Trustee of
Estate of Buddie Jerome Hayner,
bankrupt,
Appellee.

APPELLANT'S REPLY BRIEF.

CARROLL F. JACOBY,
1029 Hearst Building, San Francisco, California,
Attorney for Appellant.

FILED

JUN 16 1948

PAUL P. O'BRIEN,



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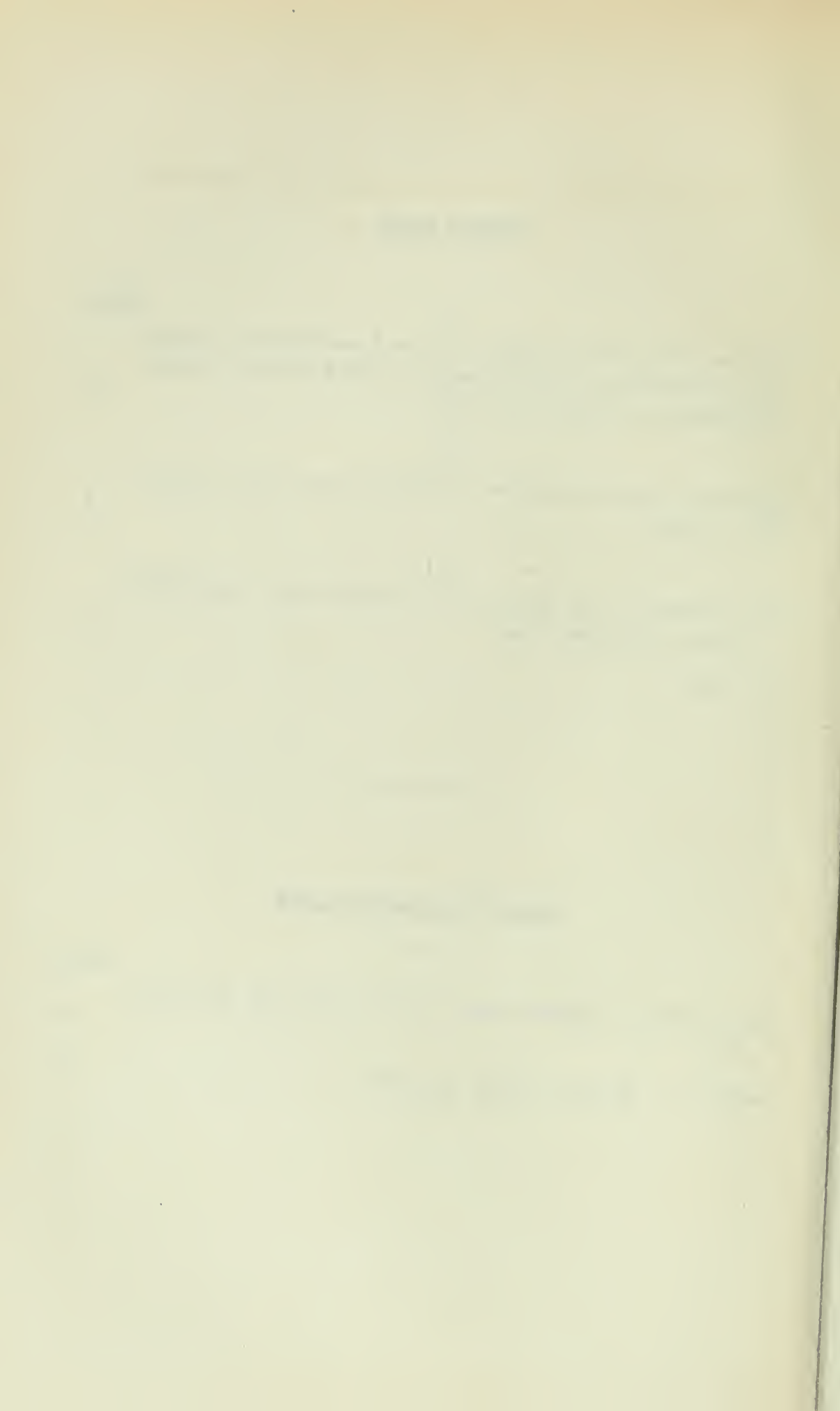
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No. 11,856

IN THE

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BUDGET FINANCE PLAN, INC.,
Appellant,

vs.

JOHN O. ENGLAND, etc., Trustee of
Estate of Buddie Jerome Hayner,
bankrupt,
Appellee.

APPELLANT'S REPLY BRIEF.

In its reply appellant has no wish to repeat the substance of its position as set forth in its opening brief, and relies on its opening argument to controvert the propositions made by appellee and in support of appellant's contention that the orders herein should be reversed. Thus, in the interests of brevity, appellant will confine itself to those few specific matters which appellant believes require particular consideration.

I.

EVIDENCE PROVES THAT PROPERLY ENDORSED CERTIFICATES OF OWNERSHIP ACCOMPANIED CHATTEL MORTGAGE MAILED TO MOTOR VEHICLE DEPARTMENT ON MARCH 21, 1947.

Although certain collateral testimony quoted by appellee (Appellee's Brief pp. 4, 5, and 9) would seem to

lend some color to his contention that properly endorsed certificates of ownership were not forwarded to the Motor Vehicle Department with the certified copy of the mortgage on March 21, 1947, a consideration of *all* of the evidence establishes that appellant did comply with this requirement on the date mentioned. It is unnecessary to go beyond the letter of the Motor Vehicle Department (Exhibit 4), to find convincing and conclusive evidence of the fact. The letter amounts to an official receipt and is self-explanatory.

II.

APPELLEE'S AUTHORITIES DO NOT CONSTITUTE BASIS TO BAR RECOVERY BY APPELLANT.

Appellee cites numerous authorities on the subject of the time in which a mortgage must be recorded to be valid against creditors of the mortgagor, but none of these alter the rule of excusable delay on which appellant is entitled to rely on the facts of this case that the requirement of prompt recording is satisfied:

“* * * only if the recording is done promptly, unless such recording is impracticable or the circumstances of the case warrant delay”.

In re Mercury Engineering, Inc., 68 Fed. Sup. 376 (D.C.S.D.), p. 380.

For example, the very quotation which appellee chooses from the case of *Williams v. Belling*, 76 Cal.

App. 610 (Appellee's Brief, pp. 11, 12), reads as follows:

“Such delay, although not affecting its validity between the parties * * *, would, *if not shown to be excusable*, render the mortgage void as to creditors * * *” (Italics ours.)

III.

TIME ELEMENT IN THE MERCURY AND GARDNER CASES COMPARABLE TO THAT IN THE INSTANT CASE.

Although appellee disputes appellant's computations regarding the number of days delay involved in the *Gardner* and *Mercury* cases (Appellee's Brief, pp. 13 to 15), in which the Courts there found that there was not such delay as to render the respective mortgages invalid, it would ill become appellant to indulge in argument involving the mechanics of computation in cases which are cited to this Court. Suffice to say that appellant believes it has fairly and properly analyzed the decisions referred to in its opening brief, and that they support its position.

CONCLUSION.

In concluding, appellant must again take issue with appellee on a specific point in that appellee is in error in his contention that the validity of the prior liens never was before the Court for determination. (Appellee's Brief, p. 16.) Appellant's petition for reclamation raises the issue. (R. p. 4.)

It is respectfully submitted that the orders of the District Court, confirming the order of the Referee, should be reversed and relief granted to appellant as prayed in its opening brief.

Dated, San Francisco, California,
June 11, 1948.

CARROLL F. JACOBY,
Attorney for Appellant.

No. 11858

United States
Circuit Court of Appeals
For the Ninth Circuit

FRED HARVEY, a corporation,
Appellant,

vs.

ELMER H. MATEAS,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

MAR 26 1948

PAUL P. O'BRIEN, CLERK



No. 11858

United States
Circuit Court of Appeals
For the Ninth Circuit

FRED HARVEY, a corporation,
Appellant,
vs.
ELMER H. MATEAS,
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Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

SHELL & DELAMER,
1212 Bartlett Bldg.,
215 W. Seventh St.,
Los Angeles 14, Calif.

For Appellee:

WALTER GOULD LINCOLN,
1113 Lincoln Bldg.,
Los Angeles 14, Calif.

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 485,744

ELMER H. MATEAS,

Plaintiff,

vs.

FRED HARVEY, a corporation; Doe No. 1; Doe
No. 2; Doe No. 3,

Defendant.

COMPLAINT FOR DAMAGES FOR
PERSONAL INJURIES

Plaintiff complains of the defendant and alleges:

I.

That Fred Harvey, a corporation, is now and was at all times mentioned herein, a corporation doing business in the State of California.

II.

That on or about June 17th, 1942, the plaintiff rented from the defendant a certain mule reported to be named "Chiggers" for the purpose of riding said mule in a party accompanied by a guide furnished by the defendant; that the said mule was selected by the defendant for the plaintiff.

That plaintiff had no knowledge of any of the peculiarities of the mule and plaintiff was not accustomed to riding this said mule.

III.

That on the same day the Plaintiff did ride the said mule and the said mule did buck and

jump and throw the plaintiff off, and the plaintiff did strike the base of his spine upon the pavement and receive a fracture of the right transverse process of the 12 dorsal vertebra. [2*]

IV.

That by reason of the same the Plaintiff did suffer continuous pain and discomfort at the small of his back and right hip. That such pain continues even to the present time.

V.

That by reason thereof he has been obliged to and has remained away from his work as a plastering contractor, and has been obliged to and has received hospitalization and the attention of physicians.

VI.

That by reason of the said injury to his spine and hip the plaintiff has been damaged in the sum of \$5,000.00, and has paid, or been obligated to pay to said physicians the sum of \$370.50; and has lost an additional sum of \$1785.00 by reason of his absence from his work.

VII.

That no part of any of said sums has been paid, and the whole thereof is now unpaid to the Plaintiff.

Wherefore, Plaintiff prays for judgment against the defendant in the sum of \$7155.00, and interests and costs.

WALTER GOULD LINCOLN.

Attorney for Plaintiff [3]

*Page numbering appearing at foot of page of original certified Transcript of Record.

State of California,
County of Los Angeles—ss.

Elmer H. Mateas being by me first duly sworn, deposes and says: that he is the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief; and as to those matters that he believes it to be true.

ELMER H. MATEAS.

Subscribed and sworn to before me this 26th day of May, 1943.

[Seal]

G. M. PAULL,

Notary Public in and for the County of Los Angeles, State of California.

My commission expires June 22, 19....

[Endorsed]: Filed May 28, 1948, 9:54 a.m. [4]

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL TO
FEDERAL COURT

To the Honorable, the Superior Court of the State
of California, in and for the County of Los
Angeles:

The petition of Fred Harvey, a corporation, one
of the defendants in the above entitled action, re-
spectively shows as follows:

I.

That petitioning defendant is a corporation
organized and existing under the laws of the State
of New Jersey, and at the time of the commence-
ment of this action and ever since has been and
still is a resident of and citizen of the State of
New Jersey.

II.

That said cause is a civil action, to-wit, an action
for damages on account of personal injuries alleged
to have been sustained by the plaintiff, Elmer H.
Mateas, as a result of being thrown from a mule
rented to him by your petitioner. [6]

III.

That the controversy involved in this action is
between citizens of the United States residing in
different states of the United States, to-wit, be-
tween the plaintiff, Elmer H. Mateas, who resides
in and is a citizen of the State of California, on
the one hand, and the defendant, Fred Harvey,
a corporation, who is a citizen of the State of New
Jersey on the other hand.

IV.

That the matter in dispute in this action exceeds in value the sum of \$3,000.00 exclusive of costs, as appears from the allegations of the complaint filed herein, which allegations are incorporated herein by reference with the same force and effect as if fully re-alleged and re-stated herein, for the purpose of showing the amount in controversy.

V.

That your petitioning defendant, Fred Harvey, a corporation, desires to remove said cause before the trial thereof in to the District Court of the United States of America in and for the Southern District of California, Central Division.

VI.

That this petitioning defendant, Fred Harvey, a corporation, hereby presents a good and sufficient bond as provided by the statutes in such cases, that said petitioning defendant will enter into such District Court of the United States, within thirty days from the filing of this petition, a certified copy of the record in this suit and conditioned for the payment of all costs which may be awarded in this action by the said Court if the said District Court holds that said action was wrongfully and improperly removed thereto.

VII.

That this petitioning defendant was served with summons and complaint in the above entitled action in Los Angeles, County of Los Angeles, State of

California, on the 23rd day of August, 1943, [7] and that said petitioning defendant's time to plead to said summons and complaint has not expired as of the date hereof. That no appearance in said action has heretofore been made by this petitioning defendant.

VIII.

That your petitioner was the owner of the mule referred to in plaintiff's complaint at the time of the renting thereof to the plaintiff and at the time of the happening of the accident referred to in plaintiff's complaint, and that no other person had any right, title or interest in or to said mule or rented the same to the plaintiff.

IX.

That a separable controversy exists between the plaintiff and your petitioning defendant in connection with the alleged liability on the part of your petitioner as the result of the renting of said mule by your petitioner to the plaintiff.

X.

That your petitioner is informed and believes and upon such information and belief alleges that the defendants other than this petitioning defendant named in said complaint, to-wit, Doe No. 1, Doe No. 2, and Doe No. 3, and each of them, are not necessary or proper parties to this action, and that said fictitiously named defendants, and each of them, have been fraudulently joined as defend-

ants in this action for the purpose of attempting to prevent a removal of this cause to said United States District Court, and that your petitioner is informed and believes and therefore alleges that no service of summons or complaint has been attempted or has been had upon such fictitiously named defendants, or any of them.

Wherefore, said petitioning defendant prays that said Superior Court proceed no further herein except to make the order of removal of said cause, as required by law, from said Superior Court to said United States District Court, and to accept and approve the said statutory bond in connection therewith, which is herewith presented [8] to said Superior Court, and to direct a transcript of the record herein to be made and certified by the Clerk of said Superior Court, as provided by law, and your petitioner will ever pray.

FRED HARVEY, a corporation,
By SCHELL & DELAMER,
By GERALD F. H. DELAMER,
Its Attorneys,
Petitioner.

SCHELL & DELAMER,
By GERALD F. H. DELAMER,
Attorney for Petitioning
Defendant.

State of California,
County of Los Angeles—ss.

Gerald F. H. Delamer, being by me first duly sworn, deposes and says: that he is one of the attorneys for the petitioning defendant in the above entitled action; that he has read the foregoing petition for removal to Federal Court and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true; that this verification is made on behalf of said petitioning defendant because said petitioner has no official within this County authorized to execute this verification, and that affiant is one of said petitioner's attorneys of record, and therefore makes this verification.

GERALD F. H. DELAMER.

Subscribed and sworn to before me this 1st day of September, 1943.

MILDRED HUFFINE,
Notary Public in and for the County of Los Angeles, State of California. [9]

[Title of Superior Court and Cause.]

ORDER FOR REMOVAL

This cause coming on for hearing upon petition and bond of Fred Harvey, a corporation, one of the defendants herein, for an order transferring this cause to the District Court of the United States for the Southern District of California, Central Division, and it appearing to the court that the said defendant has filed its petition for such removal in due form of law and that said defendant has filed its bond duly conditioned with good and sufficient sureties as provided by law, and that said defendant has given the plaintiff due and legal notice thereon, and it appearing to the court that this is a proper cause of removal to said District Court, said petition and bond are hereby accepted and approved and

It Is Hereby Ordered and Adjudged that this cause be and it is hereby removed to the United States District Court for the Southern District of California, Central Division, and that the Clerk is [12] hereby directed to make up and certify the record in said cause for transmission to said court forthwith.

Done in open court this 13th day of September, 1943.

/s/ ALFRED L. BARTLETT,
Judge.

[Endorsed]: Filed Sept. 13, 1943. [13]

District Court of the United States for the Southern District of California, Central Division

No. 3179-Y Civ.

ELMER H. MATEAS,

Plaintiff,

vs.

FRED HARVEY, a corporation, et al.,

Defendants.

SECOND AMENDED COMPLAINT

Leave of Court having been granted, Plaintiff hereby amends his complaint and alleges:

I.

That the Fred Harvey, a corporation, is now and was at all times herein mentioned, a corporation organized and existing under the laws of the State of New Jersey, and doing business in the States of Arizona and California.

II.

That the Grand Canyon of the Colorado is in the State of Arizona aforesaid, and at and on a portion of the south rim of the said Canyon, the said defendant corporation has now, and has maintained, operated and owned for at least five years last past and immediately prior to the beginning of this action, an all-year-round resort, known as El Tovar.

III.

That the Colorado River runs in a general easterly and westerly direction at the base of the said south rim, which is about a mile above [15] the surface of the said river; that as one of the attractions and inducements to the excursionist to patronize the said El Tovar the said defendant corporation has owned, operated and maintained for the same period of time two trails leading from the said south rim to the said river, one known as the "Phantom Ranch Trail" and the other known as the "Bright Angel Trail."

That the said "Bright Angel Trail" follows the contour of the canyon, is about 8 miles in length, and very tortuous, dangerous and steep, with many sharp turns and narrow pathways, all of which conditions were well known to defendant corporation on June 17th, 1942, but unknown to the Plaintiff herein.

IV.

That continuously since 1907 and particularly on June 17, 1942, and in connection with said El Tovar, said corporation did maintain and conduct excursion trips for the guests of said hotel and the general public, consisting of a ride on the back of a mule down the said canyon to the Colorado River and back, and on and along said "Bright Angel Trail."

V.

As one of the inducements to persuade the general public, and particularly this plaintiff, to

undertake such trips the defendant corporation issued and distributed at the said hotel and elsewhere in 1941 and 1942, in large quantities, a printed illustrated circular, which, among other statements, contained the following:

“Trail Trips Into the Canyon

Although visitors may venture short distances down these trails on foot, the accepted mode of travel for longer journeys is by the famous Grand Canyon mules. These faithful, sure-footed animals, in charge of experienced guides, hold a 30 years' record of carrying many thousand of inexperienced riders down the trails and back in perfect safety.” [16]

Prior to June 17, 1942, the copies of the said circular containing said statement were given to the plaintiff by said defendant corporation, and said paragraph was read by plaintiff.

VI.

Plaintiff presented himself on June 16, 1942, to an employee of said defendant who sold tickets and made reservations for the said excursions, and particularly one such excursion to be taken on July 17, 1942, and plaintiff stated then and there that he had never ridden upon either horse or mule. Whereupon, and as a portion of the said inducement of said defendant corporation, the said employee (whose name is unknown to plaintiff) stated to plaintiff that most of the persons who had made similar trips were also inexperienced riders.

VII.

Relying upon said inducements and believing the same, and particularly believing that said excursion could be taken by him in safety, and having no knowledge or means of knowledge to the contrary, the plaintiff purchased tickets for the said excursion on June 17, 1942, from defendant corporation, for himself and his wife, and paid to said defendant the fee required therefor.

VIII.

On June 17, 1942, the plaintiff and his wife presented themselves upon the premises of defendant corporation, and each climbed upon the back of a mule as selected by the employee of said defendant, the mule to which plaintiff was assigned being named "Chiggers," and being the last of a string of seven similar animals, each carrying an excursionist.

Said mule "Chiggers" had spent the preceding winter months in pasture, and this trip was the first time *had* had been either up or down any trail since said winter, none of which facts were known to plaintiff.

IX.

At said time and place the plaintiff was instructed by the trail master, John Bradley, an employee of defendant corporation, to hold the reins in his hands at all times, and plaintiff did so, not knowing what effect such act on his part might have upon the said mule, altho the other riders in

plaintiff's group aforesaid let their respective reins lie loose upon the neck of their respective [17] mules.

That said string of mules was preceded by the guide, named Bob Ennis, an employee of defendant corporation.

X.

On the ride down said Canyon the said mule "Chiggers" tried several times to squeeze past the mule in front of him on the trail, and on the outside or precipice side of the Canyon, and plaintiff was not able to control him.

XI.

Several miles down the canyon plaintiff exchanged mules with a member of the party who was an experienced rider, and plaintiff then and there told the guide that he (plaintiff) could not control "Chiggers" but that this other person could. Nevertheless said guide required the plaintiff to immediately remount and proceed upon that same "Chiggers" and plaintiff did so, without any realization of the consequences, as herein set out.

XII.

Almost immediately thereafter "Chiggers" took his former trick of passing forward, and in about an hour he started bucking and threw plaintiff from his (Chiggers) back, onto the ground and the edge of the trail, and plaintiff did strike upon the lower portion of his back and suffered great pain therefrom and lay in this place and condition for a period of four hours before he received any medical attention.

XIII.

That as a result of the said fall the Plaintiff did receive a fracture of the right transverse process of the 12th dorsal vertebra.

XIV.

That by reason of the same the Plaintiff did suffer continuous pain and discomfort at the small of his back and right hip. That such pain continues even to the present time.

XV.

That by reason thereof he has been obliged to and has remained away from his work as a plastering contractor, and has been obliged to and has [18] remained away from his work as a plastering contractor, and has been obliged to and has received hospitalization and the attention of physicians.

XVI.

That by reason of the said injury to his spine and hip the plaintiff has been damaged in the sum of Ten Thousand Dollars (\$10,000.00) and has paid, or been obligated to pay to said physicians the sum of Three Hundred and Seventy Dollars/50c, and has lost an additional sum of Seventeen Hundred and Eighty-five Dollars (\$1,785.00) by reason of his absence from his work.

XVII.

That no part of any of said sums has been paid and the whole thereof is now unpaid to the Plaintiff.

Wherefore, Plaintiff prays for judgment against the defendant in the sum of Twelve Thousand One Hundred and Fifty-five dollars and fifty cents (\$12,155.50) and interests and costs.

WALTER GOULD LINCOLN,
Attorney for Plaintiff.

[Endorsed]: Filed Aug. 22, 1945. [19]

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Comes Now the Defendant Fred Harvey, a corporation, and answering plaintiff's amended complaint for itself alone, and as a first defense thereto, admits, alleges and denies as follows:

I.

Alleges that said amended complaint, nor any part nor paragraph thereof, fails to and does not state a claim upon which relief can be granted to the plaintiff.

And as a second, separate and distinct defense thereto, this answering defendant admits, alleges and denies as follows:

I.

Answering Paragraph III, this answering defendant admits that the Colorado River runs in a general easterly and westerly direction at the

base of the said south rim of the Grand Canyon of the Colorado which is about a mile above the surface of said river; and save and except as herein specifically admitted, this answering defendant denies generally and specifically each, all [20] and every allegation in said paragraph contained.

II.

Answering Paragraph IV, this answering defendant admits that plaintiff herein rode on the back of the mule on June 17, 1942, but denies that this defendant did maintain and conduct excursion trips for the guests of the hotel and the general public consisting of a ride on the back of a mule down the said canyon to the Colorado River and back, and on and along said "Bright Angel Trail."

III.

Answering that portion of Paragraph V, commencing with the word "Prior," Line 1, Page 3, down to and through to the end of said paragraph, this answering defendant alleges that it does not have sufficient information or belief to enable it to answer the allegation therein contained and placing its denial on that ground, denies generally and specifically each, all and every allegation therein contained.

IV.

Answering Paragraph VI, this answering defendant denies generally and specifically each, all and every allegation therein contained.

V.

Answering Paragraph VII, this answering defendant denies generally and specifically each, all and every allegation therein contained.

VI.

Answering Paragraph VIII, this answering defendant denies generally and specifically each, all and every allegation therein contained.

VII.

Answering Paragraph IX, down to and including the word "mules," Line 1, Page 4, this answering defendant alleges that it has not sufficient information or belief to enable it to answer [21] same and placing its denial on that ground, denies generally and specifically each, all and every allegation therein contained.

VIII.

Answering Paragraph X, this answering defendant alleges that it does not have sufficient information or belief to enable it to answer same and placing its denial on that ground, denies generally and specifically each, all and every allegation contained therein.

IX.

Answering Paragraph XI, this answering defendant alleges that it does not have sufficient information or belief to enable it to answer same and placing its denial on that ground, denies generally and specifically each, all and every allegation contained therein.

X.

Answering Paragraph XII, this answering defendant alleges that it does not have sufficient information or belief to enable it to answer the same and therefore for want of said information and belief denies generally and specifically each, all and every of the allegation therein contained.

XI.

Answering Paragraph XIII, this answering defendant alleges that it does not have sufficient information or belief to enable it to answer the allegations of said paragraph, and therefore for want of said information or belief, denies generally and specifically each and all and every of the allegations therein contained.

XII.

Answering Paragraph XIV, this answering defendant alleges that it does not have sufficient information or belief to enable it to answer the allegations of said paragraph, and therefore for want of said information or belief, denies generally and specifically each and all and every of the allegation therein contained. [22]

XIII.

Answering Paragraph XV, this answering defendant alleges that it does not have sufficient information or belief to enable it to answer the allegations of said paragraph, and therefore for want of said information or belief, denies generally and specifically each and all and every of the allegations therein contained.

XIV.

Answering Paragraph XVI, this answering defendant alleges that it has not sufficient information or belief to enable it to answer the allegations of said paragraph, and therefore for want of said information or belief, denies generally and specifically each and all and every of the allegations therein contained, or that by reason of any matter alleged in plaintiff's complaint, or otherwise or at all the plaintiff has been damaged in the sum of Ten Thousand Dollars (\$10,000.00) or any other sum, or has paid or has been obliged to pay to any physician the sum of \$370.50, or any other sum, or has lost an additional or any sum of \$1785.00, or any other sum by reason of his or any absence from his or any work.

XV.

Denies any liability upon the part of this answering defendant by reason of any matters set forth in plaintiff's amended complaint.

And as a third, separate and distinct defense thereto, this answering defendants admits, alleges and denies as follows:

I.

That the accident referred to in plaintiff's amended complaint was an inevitable and unavoidable accident in so far as this answering defendant is concerned.

And as a fourth, separate and distinct defense thereto, this answering defendants admits, alleges and denies as follows: [23]

I.

That in riding said mule referred to in plaintiff's amended complaint, immediately prior to and up to the time of the happening of the accident referred to in plaintiff's amended complaint, the plaintiff himself had voluntarily assumed any risk to the riding of said mule.

Wherefore, this answering defendant prays that plaintiff take nothing, and that it be dismissed hence with its costs of suit incurred, and for such and further relief as to the court may seem just.

SCHELL & DELAMER,

By GERALD F. H. DELAMER,

A member of the firm,

Attorneys for Fred Harvey, a corporation.

[Endorsed]: Filed Sept. 7, 1945. [24]

[Title of District Court and Cause.]

STIPULATION FOR PRETRIAL

In conformity with the order for pretrial hearing,
It Is Hereby Stipulated:

I.

Facts Claimed by Plaintiff and Admitted
by Defendant

On June 17, 1942, and for many years prior thereto, the defendant has maintained a resort hotel on the south rim of the Grand Canyon in Arizona;

that there were a number of trails in and about said resort hotel, including the Bright Angel and Kabib, which led from the south rim to the Colorado River; that the defendant owned a large number of mules available for use by people who desired to ride said mules upon said trails. Said mules were furnished for a consideration and that the people riding said mules went in numbers not exceeding ten, preceded by a guide, an employee of the defendant; that the mules so used upon said trails were [25] first used in the packing of materials and supplies, either carrying said supplies or being ridden by the packers. After a time, and when the packers had decided that the mule was well broken in he was then used in the dude string, that is, the carrying of persons. At first after being put in the dude string they would be ridden by the guides for some period of time and when considered well broken and completely safe they were then ridden by persons other than defendant's employees.

Plaintiff arranged with the defendant to take a trip to Phantom Ranch and paid the established price therefor. On the morning of June 17, 1942, plaintiff and his wife presented themselves at the appointed place and were assigned to mules. The mules were selected by the guides and the riders assigned on the basis of weight. The mules assigned to plaintiff was known as "Chigger." The party in which plaintiff was riding consisted of seven riders, preceded by a guide, Bob Ennis. Chigger had been used as a pack and guide mule in the

canyon for two years before he became part of the dude string, and thereafter for the following two years he carried riders other than guides. During the winter month Chigger had not been used and had been in pasture, and the trip above mentioned was the first trip down the canyon for Chigger that season. The party started down the Bright Angel trail with the guide in the lead and Chigger being the last mule in the string. The ride proceeded for two or three hours, at the end of which the party arrived at Indian Gardens and stopped for a rest and lunch. After the rest and luncheon the party again mounted and continued on down the trail and after having traveled for about half an hour to an hour plaintiff was thrown from Chigger and as a result of the fall received certain injuries. [26]

Facts Claimed by the Plaintiff and Not Admitted by the Defendant, or Claimed to Be Irrelevant or Immaterial to the Issues Here Involved.

Plaintiff and his wife, while at the hotel, read and believed a circular gotten out by the Corporation, in which was printed the following: "Trail Trips into the Canyon. Although visitors may venture short distances down these trails on foot, the accepted mode of travel for longer journeys is by the famous Grand Canyon mules. These faithful, sure-footed animals, in charge of experienced guides, hold a 30 years' record of carrying many thousands of inexperienced riders down the trail and back in perfect safety." Plaintiff inquired

at the ticket booth in the lobby of the hotel about the mule excursion and remarked that he had never ridden a mule or a horse before. He was told by the clerk that most of those who took the mule trips were inexperienced riders. Thereupon, plaintiff bought tickets for himself and wife. The other riders in plaintiff's group let their reins hang from the saddle horns, but plaintiff was instructed by the guide to hold the reins in his hands at all times. On the ride down the trail Chigger tried several times to squeeze past a mule ahead on the outside or precipice side of the trail. Upon resuming the journey plaintiff changed mules with an experienced rider, but after explaining to the guide that he could not handle Chigger, he was required to remount and proceed on that animal. Almost immediately Chigger took up his old trick of pressing forward. In a half hour or so, while Chigger was pressing the mule ahead, plaintiff reined him back and Chigger started bucking, throwing and seriously injuring plaintiff. [27]

Facts Claimed by the Defendant and Not
Admitted by the Plaintiff

That Chigger was a very tractable mule and that no difficulty had been encountered in training him, and that for two years, to-wit, the seasons of 1940 and 1941, Chigger had been ridden by dudes (persons other than guides), including women and children, and that he had never been known to buck or display any vicious tendencies, but had always been a safe, quiet and reliable mule; that

all persons were instructed to hold the reins of an animal they were riding and that such is a good and accepted practice, and enables the riders to control the animal and also to assist the animal in the event it should stumble. That unlike horses, mules do not become fractious or difficult to handle if they have not been ridden for a long time, but that on the contrary, constant use hardens the muscles and increases the endurance of a mule and that on a first trip the mule would be much more prone to become tired and less ambitious, particularly after he had carried a person for several hours. The defendant had never experienced any trouble with any mules on their first trip after having rested for the winter, except that the mules tired more easily. That if plaintiff had any difficulty with the mule in trying to keep him in line (no claim being made that the mule bucked on any previous occasion) that fact was not indicated to the guide, and that plaintiff assumed any hazard which existed. Plaintiff was in charge of said animal and defendant exercised no control of the animal after plaintiff mounted him.

II.

Plaintiff has exhibited to opposing counsel all the documents intended to be offered at the trial, which are as follows: Exhibits 1, 2, 3, 4 and 5 heretofore offered in evidence in the previous trial, six colored postcards picturing El Tobar Hotel and the Bright Angel Trail [28]

Defendant has exhibited to plaintiff photographs showing the mule Chigger in various groups, showing the mule to have been ridden by women and children.

Each party reserves the right of objections as to the materiality, competency and relevancy of any of the foregoing exhibits.

III.

Counsel for plaintiff estimates the time of the trial to be two days, counsel for defendant, three days.

/s/ WALTER GOULD LINCOLN,
Attorney for Plaintiff.

SCHELL & DELAMER,
By /s/ W. O. SCHELL,
Attorneys for Defendant.

[Endorsed]: Filed Feb. 14, 1946. [29]

[Title of District Court and Cause.]

DEFENDANT'S OBJECTIONS TO INSTRUCTIONS AND SPECIAL INTERROGATORIES PROPOSED BY PLAINTIFF

In the copy of the proposed instruction served upon defendant's counsel, the instructions bear no number or identifying designation except those taken from the Book of Approved Jury Instructions; hence, we have numbered the pages con-

secutively on the assumption that the proposed instructions delivered to the Court were in the same order.

1.

Instruction appearing on page 4, being BAJI No. 6:

We do not believe this instruction is applicable in the Federal Court.

2.

Instruction appearing on page 7, being BAJI No. 9:

Likewise, we do not believe this instruction is applicable in Federal Court because it tells the jury that [58] nine may agree upon a verdict.

3.

Instruction appearing on page 16:

We do not believe there will be any evidence that the defendant corporation entered into any such contract.

4.

Instruction appearing on page 17:

Even if the matters alleged in the first paragraph of this instruction were true and the defendant knew thereof, such facts would not necessarily render the defendant liable for any injuries which followed to Mr. Mateas, and certainly before these matters, if true, could impose liability on the defendant corporation they would have to be a proximate cause of said injuries. Likewise, even

if these matters were true, the entire evidence might fail to disclose liability upon the part of the defendant corporation.

5.

Instructions appearing on pages 18 and 19:

These instructions are to the effect that the defendant impliedly warranted that the mule was suitable for the purpose for which it was hired and would carry Mr. Mateas safely down the trail. Such is not the law. The only implied warranty on the part of the defendant was a warranty that it had used reasonable care to ascertain that the mule was suitable for the purpose for which it was hired.

6.

Instruction appearing on page 20:

This instruction places the duty of utmost care and diligence upon the defendant. The only duty imposed upon the defendant was to exercise reasonable care to ascertain that the mule was suitable for the purpose for which it was hired. [59]

7.

Instruction appearing on page 21:

This instruction is meaningless and would tend to confuse the jury.

8.

Instruction appearing on page 24:

This instruction, if given, would be confusing to the jury and might be construed by them as entitling them to award the plaintiff the amount

prayed for irrespective of the nature of the proof as to damages sustained by him as the proximate result of the accident.

In support of Objections Nos. 3 to 7, inclusive, we submit that the owner of a mule hiring the same is not an insurer, and the burden is on the plaintiff to prove that the mule was dangerous and unsuitable for the purpose for which it was hired, and that either the defendant knew that fact or in the exercise of reasonable care should have known that fact.

We respectfully cite this Court to the opinion of the Circuit Court of Appeal, upon the appeal in this case:

Mateas vs. Fred Harvey, 146 Fed. (2) 989;
Dam vs. Lake Aliso, 6 Cal. (2d) 395;
Kersten vs. Young, 52 Cal. App. (2d) 1;
Heath vs. Fruzia, 50 Cal. App. (2d) 598.

The defendant objects to each and all of the proposed questions requested by the plaintiff to be propounded to the jury on the ground that these questions, nor any of them, do not involve any issues in the case.

Respectfully submitted,
SCHELL & DELAMER,
By W. O. SCHELL,
Attorneys for Defendant.

[Affidavit of Service by Mail.]

[Endorsed]: Filed Sept. 26, 1947. [60]

[Title of District Court and Cause.]

JURY INSTRUCTIONS REQUESTED BY
DEFENDANT, FRED HARVEY, A COR-
PORATION [61]

The defendant, Fred Harvey, a corporation, requests the Court to give the jury the following instructions and each of them. [62]

Defendant's Requested Instruction No. 1

It becomes my duty as judge to instruct you in the law that applies to this case, and it is your duty as jurors to follow the law as I shall state it to you. On the other hand, it is your exclusive province to determine the facts in the case, and to consider and weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law stated to you. [63]

Defendant's Requested Instruction No. 2

On the other hand, your own authority to judge the evidence and to determine the facts in the case has this limitation: it is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law stated to you. [64]

Defendant's Requested Instruction No. 3

At times through out the trial the Court has been called upon to pass on the question whether

or not certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings and are not to draw any inferences from them. Whether offered evidence is admissible is purely a question of law. In admitting evidence to which an objection is made, the court does not determine what weight should be given such evidence; nor does it pass on the credibility of the witness. As to any offer of evidence that has been rejected by the Court, you, of course, must not consider the same; as to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection. [65]

Defendant's Requested Instruction No. 4

You must weigh and consider this case without regard to sympathy, prejudice, or passion for or against either party to the action. [66]

Defendant's Requested Instruction No. 5

It is your duty as jurors to consult with one another and to deliberate, with a view to reaching an agreement, if you can do so without violence to your individual judgment. You each must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact

that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors. [67]

Defendant's Requested Instruction No. 6

In civil actions the party who asserts the affirmative of an issue must carry the burden of proving it: In other words, the "burden of proof" as to that issue is on that party. This means that if no evidence were given on either side of such issue, your finding as to it would have to be against that party. When the evidence is contradictory, the decision must be made according to the preponderance of evidence, by which is meant such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability of truth lies therein. Should the conflicting evidence be evenly balanced in your minds, so that you are unable to say that the evidence on either side of the issue preponderates, then your finding must be against the party carrying the burden of proof, namely, the one who asserts the affirmative of the issue. [68]

Defendant's Requested Instruction No. 7

Whenever in these instructions I state that the burden, or the burden of proof, rests upon a certain party to prove a certain allegation made by him, the meaning of such an instruction is this: that

unless the truth of that allegation is proved by a preponderance of the evidence, you shall find the same to be not true.

The term "preponderance of the evidence" means such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability of truth lies therein. [69]

Defendant's Requested Instruction No. 8

You shall not consider as evidence any statement of counsel made during the trial, unless such statement was made as an admission or stipulation conceding the existence of a fact or facts.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the court; such matter is to be treated as though you never had known of it.

You are to decide this case solely upon the evidence that has been received by the court, and the inferences that you may reasonably draw therefrom, and such presumptions as the law deduces therefrom, as noted in my instructions, and in accordance with the law as I state it to you. [70]

Defendant's Requested Instruction No. 9

In judging the credibility of witnesses, you shall have in mind the law that a witness is presumed to speak the truth. This presumption, however, may be overcome by contradictory evidence, by the manner in which the witness testifies, by the character of his testimony, or by evidence that pertains to his motives. [71]

Defendant's Requested Instruction No. 10

Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use ordinary care in the management of one's property or person. [72]

Defendant's Requested Instruction No. 11

Negligence is not an absolute term, but a relative one. By this we mean that in deciding whether there was negligence in a given case, the conduct in question must be considered in the light of all the surrounding circumstances, as shown by the evidence. [73]

Defendant's Requested Instruction No. 12

You will note that the person whose conduct we set up as a standard is not the extraordinarily cautious individual, nor the exceptionally skillful one, but a person of reasonable and ordinary prudence. While exceptional skill is to be admired and encouraged, the law does not demand it as a general standard of conduct. [74]

Defendant's Requested Instruction No. 13

Ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs in order to avoid injury to themselves or to others. [75]

Defendant's Requested Instruction No. 14

The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause—the one that necessarily sets in operation the factors that accomplish the injury. [76]

Defendant's Requested Instruction No. 15

This does not mean that the law seeks and recognizes only one proximate cause of an injury, consisting of only one factor, one act, one element of circumstance, or the conduct of only one person. To the contrary, the acts and omissions of two or more persons may work concurrently as the efficient cause of an injury, and in such a case, each of the participating acts or omissions is regarded in law as a proximate cause. [77]

Defendant's Requested Instruction No. 16

The burden is upon the plaintiff to prove by a preponderance of the evidence that the defendant was negligent and that such negligence was a proximate cause of injury to the plaintiff. [78]

Defendant's Requested Instruction No. 17

The mere fact that an accident happened, considered alone, does not support an inference that some party, or any party, to this action was negligent. [79]

Defendant's Requested Instruction No. 18

Likewise it is not sufficient for the plaintiff to establish that he received injuries in the accident involved in this case but the plaintiff must go further and prove by a preponderance of the evidence that the accident and resulting injuries to him were proximately due to the negligence of the defendant.

Defendant's Requested Instruction No. 19

The law does not permit you to guess or speculate as to the cause of the accident in question. If the evidence is equally balanced on the issue of negligence or proximate cause, so that it does not preponderate in favor of the party making the charge, then he has failed to fulfill his burden of proof. To put the matter in another way, if after considering all the evidence, you should find that it is just as probable that either the defendant was not negligent or if he was, his negligence was not a proximate cause of the accident, as it is that some negligence on his part was such a cause, then a case against the defendant has not been established. [81]

Defendant's Requested Instruction No. 20

In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still, no one may be held liable for injuries resulting from it.

Defendant's Requested Instruction No. 21

The defendant was not an insurer of the safety of the plaintiff.

Mateas vs. Fred Harvey.

(Decision on appeal in this case.) [83]

Defendant's Requested Instruction No. 22

The obligation upon the defendant in this case was a contractual obligation against reckless or heedless hiring out of a mule without reasonable care to ascertain the habits of said mule with respect to its safety and suitabilities for the purpose for which it was hired.

Dam vs. Lake Aliso Riding School,

6 Cal. (2d) 395, 400.

Mateas vs. Fred Harvey.

(Decision on appeal in this case.) [84]

Defendant's Requested Instruction No. 23

If you find that the defendant did at all times exercise reasonable care to ascertain the habits and disposition of the mule involved in this case, and that as a result of the information so obtained a reasonably prudent person situated as was the defendant would have concluded that said mule was fit and suitable for the purpose of carrying the plaintiff upon the excursion involved in this case, then your verdict must be against the plaintiff and in favor of the defendant.

Dam vs. Lake Alliso Riding School,

6 Cal. (2d) 395, 399.

Mateas vs. Fred Harvey.

(Decision on appeal in this case.) [85]

Defendant's Requested Instruction No. 24

If you find that the defendant at all times exercised the care of a reasonably prudent person to furnish to the plaintiff a mule which was fit and suitable for the purpose of carrying the plaintiff upon the excursion involved in this case then the defendant was not guilty of negligence and your verdict must be for the defendant. [86]

Defendant's Requested Instruction No. 25

Contributory negligence is negligence on the part of a person injured which, cooperating in some degree with the negligence of another, helps in proximately causing the injury of which the former thereafter complains.

One who is guilty of contributory negligence may not recover from another for the injury suffered.

Defendant's Requested Instruction No. 26

The law forbids you to attempt to classify negligence into degrees or grades or kinds, or to compare one instance of negligence with another and judge which is more deserving of reproof or excuse. If you should find that there was negligent conduct on the part of more than one person, you are not to attempt to determine which was guilty of the greater negligence, with a view to delivering a verdict in favor of, or to favor in any way, the one whose conduct was the less reprehensible. [88]

Defendant's Requested Instruction No. 27

There is a legal principle commonly referred to by the term "assumption of risk." A person is said to assume a risk when he knows or in the exercise of ordinary care would know that a danger exists in connection with an enterprise, but nevertheless voluntarily undertakes that enterprise.

A person who thus assumes a risk is not entitled to recover for injuries or damage resulting to him from the risk so assumed by him. [89]

Defendant's Requested Instruction No. 28

If you find that the plaintiff in this case was injured as the result of a risk inherent in the nature of the excursion which plaintiff was making and which plaintiff as a reasonably prudent man should have realized before undertaking said excursion then the plaintiff cannot recover in this action and your verdict must be for the defendant. [90]

Defendant's Requested Instruction No. 29

Your attention is called to a distinction between contributory negligence and assumption of risk. Contributory negligence must contribute in some degree as a proximate cause to the happening of the accident. Assumption of risk, however, bars recovery for injuries although it plays no part in causing the accident except merely to expose the person to the danger. [91]

Defendant's Requested Instruction No. D-1

Damages must be reasonable. In the event that your verdict is for the plaintiff, you can award him only such damages as will fairly and reasonably compensate him for the injuries or damages which you believe from a preponderance of the evidence he has sustained as a direct, natural and proximate result of the accident. [92]

Defendant's Requested Instruction No. D-2

If your verdict is in favor of the plaintiff, in arriving at the amount thereof you must consider only the actual pecuniary injury which the plaintiff has sustained, if any, as the direct, natural and proximate result of the accident involved in this case. It is only such actual pecuniary damage, if any, and nothing else which the plaintiff can recover in this case, if he recover at all. [93]

Defendant's Requested Instruction No. D-3

Neither the allegations of the complaint as to the amount of damage plaintiff claims to have suffered, nor the prayer asking for certain compensation, is to be considered by you in arriving at your verdict, except in this one respect, that the amount of damage alleged in the complaint does fix a maximum limit, and you are not permitted to award plaintiff more than that amount. [94]

Defendant's Requested Instruction No. D-4

Throughout these instructions I have instructed you as to the measure of damages which the plaintiff is entitled to recover in the event that you find that your verdict is for the plaintiff. I have done so because the law imposes this duty upon me. The fact that I have instructed you as to the measure of damages in this case is not to be taken by you in any sense as an intimation that I feel that you should or should not return a verdict either for the plaintiff or for the defendant. Such instructions are intended for your guidance only in the event that you find from the evidence that your verdict is for the plaintiff, and if you believe from the evidence that the defendant was not negligent in some respect as charged in the complaint, or that any negligence on the part of the defendant was not a proximate cause of the accident, or that the plaintiff was guilty of negligence proximately contributing to the happening of the accident, or that plaintiff had assumed the risk which caused him injury, then your verdict must be against the plaintiff and in favor of the defendant and you are further instructed that in such event you are to disregard entirely all instructions which I have given you concerning the measure of damages. [95]

Received copy of the within Jury Instructions this 24th day of September, 1947.

/s/ WALTER GOULD LINCOLN,
Attorney for Plaintiff.

[Endorsed]: Filed Oct. 6, 1947. [96]

[Title of District Court and Cause.]

ADDITIONAL JURY INSTRUCTIONS REQUESTED BY DEFENDANT FRED HARVEY, A CORPORATION

Defendant's Requested Instruction No. A1

The mere fact that an accident happened considered alone does not give rise to an inference that the defendant breached any warranty. [98]

Defendant's Requested Instruction No. A2

There is no evidence in this case that the defendant made any express warranty that the plaintiff would make the trip involved in this case in safety.

Defendant's Requested Instruction No. A3

Where there is no evidence of an express warranty having been made you must find that no such warranty was made. [100]

Defendant's Requested Instruction No. A4

If you find that the defendant did at all times exercise reasonable care to ascertain the habits and disposition of the mule involved in this case and that as a result of the information so obtained a reasonable prudent person situated as was the defendant would have concluded that said mule was fit and suitable for the purpose of carrying the plaintiff upon the trip involved in this case then you must find that the defendant did not breach any express warranty. [101]

Defendant's Requested Instruction No. A5

The only implied warranty made by the defendant in this case was a warranty against the reckless or heedless hiring out of a mule without having exercised reasonable care to ascertain the habits of said mule with respect to its safety and suitability for the purposes for which it was hired. [102]

Defendant's Requested Instruction No. A6

If you find that the defendant did at all times exercise reasonable care to ascertain the habits and disposition of the mule involved in this case and that as a result of the information so obtained a reasonable prudent person situated as was the defendant would have concluded that said mule was fit and suitable for the purpose of carrying the plaintiff upon the trip involved in this case then you must find that the defendant did not breach any implied warranty. [103]

Defendant's Requested Instruction No. A7

If you find that the defendant at all times exercised the care of a reasonably prudent person to furnish to the plaintiff a mule which was fit and suitable for the purpose of carrying the plaintiff upon the trip involved in this case then your verdict must be for the defendant. [104]

Defendant's Requested Instruction No. A8

The mere fact that the mule may have bucked at the time of the accident involved in this case

is not sufficient to establish a breach of any warranty or that the mule was not fit or suitable for the purpose for which it was hired. [105]

Received copy of the within Additional Instructions this 2nd day of October, 1947.

/s/ WALTER GOULD LINCOLN,
Attorney for Plaintiff.

[Endorsed]: Filed Oct. 6, 1947. [106]

In the District Court of the United States, Southern
District of California, Central Division

No. 3179-WM Civil

ELMER H. MATEAS,

Plaintiff,

vs.

FRED HARVEY, a corporation, et al.,

Defendants.

VERDICT

We, the jury in the above entitled cause, find in favor of the plaintiff, Elmer H. Mateas, and against the defendant, Fred Harvey, a corporation, and assess the plaintiff's damages in the sum of \$7,500.00.

Los Angeles, California, October 6, 1947.

/s/ GEO. G. WALKER,
Foreman of the Jury.

[Endorsed]: Filed Oct. 6, 1947. [112]

In the District Court of the United States, Southern
District of California, Central Division

3179-WM Civil

ELMER H. MATEAS,

Plaintiff,

vs.

FRED HARVEY, a corporation, et al.,

Defendants.

JUDGMENT

The above entitled cause having come on regularly for trial on September 23rd, 1947, before the Honorable Wm. C. Mathes, District Judge, sitting with a jury. The jury was duly impanelled and sworn to try the cause. Evidence, both oral and documentary was introduced. On motion of the plaintiff the cause was dismissed as to all defendants other than the defendant Fred Harvey, a corporation. At the conclusion of the evidence the cause was argued to the jury by counsel for the respective parties, and the court instructed the jury on the law of the case, whereupon the jury retired in charge of the bailiffs, duly sworn, to consider their verdict. The jury returned into court with their verdict in words and figures as follows: "In the District Court of the United States, Southern District of California, Central Division. Elmer H. Mateas, Plaintiff, vs. Fred Harvey, a corporation, et al., Defendants. No. 3179-WM Civil.

Verdict: We, the jury in the above entitled cause, find in favor of the plaintiff, Elmer H. Mateas, and against the defendant, Fred Harvey, a corporation, and assess the plaintiff's damages in the sum of \$7,500.00. Los Angeles, California, October 6, 1947. Geo. G. Walker, Foreman of the Jury." The verdict was ordered filed and entered, and the Clerk was directed to enter judgment in accordance with the verdict.

Wherefore, by reason of the premises aforesaid and the law, it is ordered that the plaintiff, Elmer H. Mateas, do have and recover from Fred Harvey, a corporation, defendant, the sum of seven thousand five hundred dollars (\$7,500.00), and have execution therefor.

Costs taxed at \$109.65.

EDMUND L. SMITH,
Clerk,

By /s/ LOUIS J. SOMERS,
Deputy Clerk.

Judgment entered Oct. 6, 1947, and docketed Oct. 6, 1947, Book 46, Page 190.

[Endorsed]: Filed Oct. 6, 1947. [113]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now the defendant, Fred Harvey, a corporation, and moves the above entitled Court for a new trial and for an order vacating and setting aside the judgment heretofore entered in favor of the plaintiff and against this moving defendant. Said motion is made upon the following grounds and each of them, to-wit:

1. Irregularity in the proceedings of the adverse party and his attorney by which the defendant was prevented from having a fair trial in that in his closing argument plaintiff's counsel repeatedly referred to the matter of negotiations for settlement and discussions of settlement alleged to have occurred on July 6, 1942, in direct conflict to the court's prior ruling in connection with the same conversation.

2. Misconduct of the jury.

3. Accident and surprise which ordinary prudence could [114] not have guarded against.

4. Excessive damages appearing to have been given under passion or prejudice.

5. Insufficiency of evidence to justify the verdict in that the evidence is insufficient to justify the implied finding of the jury that the defendant breached any warranty or that said defendant failed to exercise ordinary care in ascertaining the disposition of the mule at any time prior to the happening of the accident forming the basis of plain-

tiff's claim. On the further ground that the evidence shows that plaintiff assumed the risk of any injuries resulting from the use of said mule. Upon the further ground that the evidence of the injuries sustained by plaintiff does not justify an award of \$7500.00.

6. Errors at law occurring at the trial, to-wit: error in admission of evidence of conversations between the plaintiff and one Bole occurring prior to the happening of said accident and not taking place within the hearing or in the presence of the defendant or any of its agents, servants or employees. On the further ground that Instruction No. 16 given by the Court limits the assumption of risk to an accident not proximately contributed to by the negligence of the defendant and the refusal to give defendant's Requested Instruction No. 27.

Respectfully submitted,

W. O. SCHELL,

A member of the law firm of Schell & Delamer,
attorneys for the defendant, Fred Harvey, a
corporation. [115]

NOTICE OF MOTION

To the Plaintiff, Elmer H. Mateas, and to Walter Gould Lincoln, Esq., His Attorney:

You and Each of You Will Please Take Notice that the foregoing motion for a new trial and for an order of the Court vacating and setting aside the judgment heretofore entered in favor of the plaintiff and against the defendant will be brought on before the above entitled Court in the Department of the Honorable William C. Mathes at such time and place as may be designated by said Court.

Said motions will be based upon the foregoing written Motion and upon all the pleadings, records, files and the minutes of the Court in the above entitled matter and upon the Memorandum of Points and Authorities accompanying this Notice of Motion.

Dated: October 15, 1947.

W. O. SCHELL,

A member of the law firm of Schell & Delamer, attorneys for the defendant, Fred Harvey, a corporation.

(Affidavit of Service by Mail.)

[Endorsed]: Filed Oct. 16, 1947. [116]

[Title of District Court and Cause.]

ORDER DENYING MOTION OF DEFEND-
ANT, FRED HARVEY, A CORPORATION,
FOR A NEW TRIAL

This cause having heretofore come before the court for hearing on the motion of defendant, Fred Harvey, a corporation, for a new trial, and the motion having been heard and submitted for decision,

It Is Now Ordered that the motion of defendant, Fred Harvey, a corporation, for a new trial be and is hereby denied; and

It Is Further Ordered that the Clerk this day forward copies of this order by United States mail to the attorneys for the parties appearing in this cause.

December 10, 1947.

WM. C. MATHES,
United States District Judge.

[Endorsed]: Filed Dec. 10, 1947. [117]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Plaintiff, Elmer H. Mateas, and to Walter Gould Lincoln, his attorney:

Notice Is Hereby Given that Fred Harvey, a corporation, defendant in the above entitled cause, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment and the whole thereof, entered in the within action on the 6th day of October, 1947, in favor of said plaintiff and against said defendant.

Dated this 8th day of January, 1948.

SCHELL & DELAMER,
By GERALD F. H. DELAMER,
Attorneys for Defendant and Appellant, Fred Harvey, a corporation.

[Endorsed]: Filed Jan. 8, 1948. [118]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY IN THE APPEAL OF THIS CASE

I.

That the trial court committed error in admitting in evidence the testimony of the witness Ella W.

Vogel as to conversations which she heard between the plaintiff and a Mr. Boles, which conversations did not take place in the presence of or within the hearing of the defendant or any of its agents, servants or employees, and which testimony appears in the Reporter's transcript on pages 141 to 148, inclusive.

II.

That the court committed error in the giving to the jury of the following instruction:

"The defendant was not an insurer of the safety of the plaintiff. The plaintiff assumed all risks which he knew, or in the [123] exercise of ordinary care should have known, were inherent in the trip; but the plaintiff did not assume any risk which was proximately caused by failure of the defendant, either before or at the time of the accident, to exercise ordinary care under the circumstances."

Dated: January 20, 1948.

SCHELL & DELAMER,

By GERALD F. H. DELAMER,

Attorneys for Defendant and Appellant, Fred Harvey, a corporation.

Received copy of the within this 20 day of January, 1948.

/s/ WALTER GOULD LINCOLN,
Attorney for Plaintiff.

[Endorsed]: Filed Jan. 20, 1948. [134]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

To the Clerk of the United States District Court
for the Southern District of California, Central
Division:

You Will Please Prepare a transcript of the record
of this case to be used upon appeal in the above en-
titled case embodying the following:

1. The complaint;
2. The petition for removal from state to fed-
eral court;
3. Notice of motion to remove to federal court;
4. Bond on said removal;
5. Order for removal to federal court;
6. Second amended complaint;
7. Answer to amended complaint filed the 6th
day of September, 1945;
8. Stipulation for pre-trial;
9. Order on pre-trial hearing; [125]
10. Defendant's objections to instructions and
interrogatories proposed by plaintiff;
11. Plaintiff's objections to proposed instructions
of defendant;
12. Instructions to the jury requested by de-
fendant;
13. Verdict;
14. Judgment;
15. Motion for new trial;

16. Notice of said motion (eliminating memorandum of points and authorities in support of said motion);
17. Order denying motion for new trial;
18. Notice of appeal;
19. Supersedeas and cost bond on appeal;
20. Designation of record on appeal;
21. Statement of points upon which appellant intends to rely in the appeal in this case;
22. Reporter's transcript of proceedings upon the trial (2 copies of which have been heretofore furnished you);
23. Plaintiff's exhibits 6 and 6A;
24. Defendant's exhibits I-1 to I-14, inc.;
25. Defendant's exhibits E, F and G;
26. Order for transfer of original exhibits.

Dated: January 20, 1948.

SCHELL & DELAMER,

By GERALD F. H. DELAMER,

Attorneys for Defendant and Appellant, Fred
Harvey, a corporation.

Received copy of the within this 20 day of January, 1948.

/s/ WALTER GOULD LINCOLN.

[Endorsed]: Filed Jan. 20, 1948. [126]

[Title of District Court and Cause.]

ORDER FOR TRANSFER OF ORIGINAL
EXHIBITS

It Is Hereby Ordered that the original exhibits now on file in the above entitled matter need not be copied but may be transferred in their original state to the United States Circuit Court of Appeals, for the Ninth Circuit.

Dated at Los Angeles, California, this 20 day of January, 1948.

WM. O. MATHES,
Judge.

[Endorsed]: Filed Jan. 21, 1948. [127]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 130, inclusive, contain full, true and correct copies of Complaint for Damages for Personal Injuries; Notice of Motion to Remove to Federal Court; Petition for Removal to Federal Court; Bond on Removal; Order for Removal; Certificate of Clerk of the Superior Court to Removal Papers; Second Amended Complaint; Answer to Amended Complaint; Stipulation for Pretrial; Plaintiff's Proposed Instructions; Defendant's Objections to Instructions and Special Interrogatories Proposed by Plaintiff; Jury In-

structions Requested by Defendant Fred Harvey; Additional Jury Instructions Requested by Defendant Fred Harvey; Plaintiff's Objection to Certain Proposed Instructions of the Defendant; Plaintiff's Objections to Proposed Instructions of Defendants; Verdict; Judgment; Motion for New Trial; Order Denying Motion for a New Trial; Notice of Appeal; Supersedeas and Cost Bond on Appeal; Statement of Points Upon Which Appellant Intends to Rely in the Appeal of this Case; Designation of Record on Appeal; Order for Transfer of Original Exhibits; and Plaintiff's Designation of Additional Portions of the Record and Documents to be Included in the Transcript on Appeal which, together with original plaintiff's exhibits 1-J, 1-K, 1-M, 1-P, 4, 6, 6-A and original defendant's exhibits E, F, G, and I-1 to I-14, inclusive, and copy of reporter's transcript of proceedings on February 19, 1946, September 23 and 30, 1947, and October 1, 2, 3 and 6, 1947, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$27.60, which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 13 day of February, A. D. 1948.

[Seal]

EDMUND L. SMITH,

Clerk,

By /s/ THEODORE HOCKE,

Chief Deputy.

In the District Court of the United States for
the Southern District of California, Central
Division.

Honorable William C. Mathes, Judge Presiding

No. 3179-WM Civil

ELMER H. MATEAS,

Plaintiff,

vs.

FRED HARVEY, a corporation, et al.,

Defendants.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California

Tuesday, February 19, 1946

Appearances:

For the Plaintiff: Walter Gould Lincoln, Esq.

For the Defendants: Schell & Delamer, Esqs.,
by W. O. Schell, Esq.

Mr. Lincoln: Ready. In that matter, your Honor,
we have filed with the clerk the stipulated documents
which your Honor required.

The Court: I have read the stipulation and the
memoranda

Mr. Lincoln: Yes, sir.

The Court: Do you have the exhibits, Mr. Clerk?

The Clerk: Yes.

The Court: Would each side wish now to have
their exhibits marked and identified in the record?

Mr. Lincoln: Well, we should like to, your Honor.

And, in addition to that, there are two or three illustrated postal cards which I have exhibited to counsel and which I would also like to present to the clerk to have filed, but I unfortunately do not have them with me at this time. Mr. Schell, however, has some additional photographs which he has shown to me and which I think he would like to have marked at this time for identification.

Mr. Schell: I take it this marking would mean merely for identification, if the court please?

The Court: Yes. They will be withdrawn and they won't be filed here, they won't be lodged, even. You may take them [2*] away with you. If you want to bring in other documents, you may do so.

Mr. Schell: Because, frankly, one or two of the exhibits which were in the previous trial we still have objection as to the materiality.

The Court: Yes. What I was seeking to do is to obviate the foundational questions—questions as to genuineness and due execution, insofar as we could.

The plaintiff has exhibits 1, 2, 3, 4, and 5 heretofore offered. Do you have those, Mr. Clerk?

The Clerk: Yes, your Honor. Would you like to see them?

The Court: Yes, please. Does the plaintiff expect in the next trial to offer the same?

Mr. Lincoln: Yes, sir, I do. I surmise, however, that there will be objection to the admission of some of those photographs. Of course, that would be for your Honor's determination as to that.

* Page numbering appearing at top of page of Reporter's certified Transcript of Record.

The Court: Here is a circular: "Grand Canyon National Park of Arizona." It was marked Plaintiff's Exhibit 1 for identification in this last trial. Does the defendant admit the genuineness of this document?

Mr. Schell: Insofar as the genuineness is concerned, yes.

The Court: As having been issued by the defendant? [3]

Mr. Schell: I assume that is correct. I can't tell from here.

The Court: I will be glad to have you examine it. I think that we can dispose of these matters and it might save some time.

Mr. Schell: Yes. That is one issued by the defendant, but insofar as that being one issued, we won't question that. As to the materiality in this particular negligence case, that is something else.

The Court: Yes; I appreciate that. But, as I say, we are trying to resolve foundational questions. So, insofar as the genuineness of the document is concerned——

Mr. Schell: We won't question that.

The Court: ——the defendant offers to stipulate that the document was issued by the defendant.

Mr. Schell: So stipulated.

The Court: Do you accept that stipulation, Mr. Lincoln?

Mr. Lincoln: Yes, sir. Thank you.

The Court: Here is a circular which was Plaintiff's Exhibit 2 for identification at the preceding

trial: "Grand Canyon National Park," etc. Will it be stipulated, Mr. Schell, that that was issued by the defendant?

Mr. Schell: I will see if I can see the name on there. I can't seem to see anything on here as to who issued this thing, whether the Santa Fe Railroad or Fred Harvey. [4]

Mr. Lincoln: I might suggest, your Honor, that in that connection and with relation to this particular exhibit, we only are interested in it so far as the pictures themselves are concerned, to identify the pictures as being the Grand Canyon and the portion of the trail. And I think, as my memory serves me, those particular photographs which are a portion of this circular were identified as being those places by one of the witnesses at the former trial.

The Court: The photographs on the circular?

Mr. Lincoln: Yes, sir.

The Court: Plaintiff's Exhibit 2 for identification?

Mr. Lincoln: Yes, sir.

The Court: Correctly depict certain scenes?

Mr. Lincoln: We believe so; yes, sir. We are not concerned, your Honor, with the writing in the circular.

Mr. Schell: If it is just for the pictures, we will stipulate that they are pictures of what they purport to be.

Mr. Lincoln: That is all.

The Court: Scenes in Grand Canyon, and correctly depict what they purport to depict?

Mr. Schell: That is right.

The Court: As to time?

Mr. Schell: At or about this time.

The Court: At or about the time of the accident?

Mr. Lincoln: Yes, your Honor. [5]

The Court: And that Plaintiff's Exhibit 1 was issued and was in current circulation at or about the time of the accident?

Mr. Schell: I am so prepared to stipulate, because Mr. Lincoln said it came from there.

The Court: Very well. I had thought this pamphlet I have in my hand, apparently issued by the Department of the Interior, was Exhibit 3, but I do not see the marking.

The Clerk: Page 9.

Mr. Lincoln: In that regard, your Honor, there was just one page which we referred to there, which was a map of the locality, and that was the only portion of that circular which we introduced.

The Court: The clerk handed it to me with this page up and then I closed the pamphlet and lost the reference. Is there any stipulation you can make with respect to this? Does it purport to be a map of the south rim of the Grand Canyon?

Mr. Lincoln: That is supposed to be the El Tovar Hotel and its immediate surroundings.

The Court: Are you willing to stipulate that this map correctly depicts the relative locations of the various objects and buildings and the portions it depicts?

Mr. Schell: I assume so. May I just have a glance at it? Oh, I am willing to do so. I do not see it is material [6] one way or the other, but I am willing to stipulate.

The Court: Of course, we can't determine at this time as to the materiality of any of them.

Mr. Schell: I will stipulate it is a map of what it shows to be there, what it purports to show there.

The Court: And correctly depicts the relative locations of the various objects and buildings that it purports to depict?

Mr. Schell: Yes; so stipulated.

The Court: Do you accept that stipulation?

Mr. Lincoln: We will accept the stipulation, also.

The Court: Plaintiff's Exhibit 4 is a photograph with some people astride mules. Is there any stipulation that you gentlemen can make with respect to that?

Mr. Lincoln: I think we agreed, your Honor, at the trial that we had of this before that this was an actual photograph of the party in which the plaintiff was a member and was taken at the time of the trip which we are discussing.

The Court: What was the time of the trip?

Mr. Lincoln: July.

Mr. Schell: June, wasn't it?

Mr. Lincoln: June 17th.

The Court: 1942?

Mr. Schell: 1942.

Mr. Lincoln: 1942; yes, sir. [7]

Mr. Schell: Yes. This picture was taken at the head of the trail before they started down.

The Court: That was at the outset of the ride.

Mr. Schell: The outset of the ride, yes.

The Court: Do you have any other documents in evidence, Mr. Lincoln? Here are some X-rays.

Mr. Lincoln: I thought there was another circular here, your Honor.

The Court: Here is a bill, the clerk shows me, of Dr. T. E. Cox and of the Grand Canyon hospital, which are attached together and marked plaintiff's Exhibit 5. I suppose there will be testimony. Perhaps you can have a stipulation as to both Grand Canyon Hospital and the doctor. Is there any stipulation you can make with respect to these bills?

Mr. Schell: I do not believe we can at this time. I will get together with Mr. Lincoln and see if we can work them out, to minimize the trial, but I do not sufficiently remember those bills to say now.

The Court: I suppose you might be able to reach a stipulation that they were in fact incurred and in fact paid.

Mr. Lincoln: Yes. I think that was testified to by Mr. Mateas, that those were the bills which he received and which he paid at the time.

The Court: Mr. Clerk, will you mark the exhibits for identification which have been identified so far? Will it be [8] your practice to re-mark them again at the second trial?

The Clerk: No. I have numbered them 1 to 4, and those are the same numbers that they bore.

The Court: They carry the same numbers, but do you put another slip on them?

The Clerk: Yes, your Honor. I have done that.

The Court: Very well. These two statements, one of the hospital and one of a doctor bill, pinned together, Plaintiff's Exhibit 5 for the last trial, may be marked Plaintiff's Exhibit 5 for identification for the forthcoming trial.

One X-ray here is marked Plaintiff's Exhibit 6. The other X-rays are one other large one and four small ones.

Mr. Lincoln: I think they all came in as the one exhibit, your Honor.

The Court: As one exhibit.

Mr. Lincoln: And that was Dr. Sloan, as I remember.

The Clerk: I have my record from the last time. Six is an X-ray picture by Dr. Sloan; 7 is a bill of Dr. Sloan, and 6-A for identification were three X-ray pictures by Dr. Sloan.

The Court: These are the three. They do not seem to be marked three.

The Clerk: That is my record, your Honor.

The Court: There are three small ones and one large one. I assume there will be testimony as to these photographs? [9]

Mr. Lincoln: Yes, your Honor. We shall endeavor to have the person who took the X-rays here.

The Court: They may be marked in the respective numbers for identification at this time.

Mr. Lincoln: Yes, sir.

The Court: So that detail will be taken care of in the event of trial.

Mr. Lincoln: Yes, sir.

The Court: Then, here is a bill of Dr. Sloan's which is marked Plaintiff's Exhibit 7. I assume Dr. Sloan will testify?

Mr. Lincoln: I think so, sir, as far as I know now.

The Court: Is there any stipulation you wish to make with respect to that?

Mr. Schell: I do not see that there is anything we could stipulate to it at the moment.

The Court: The only thing I would suggest, possibly that the bill was incurred and was paid, if you are satisfied with those facts.

Mr. Schell: Is it marked "paid"?

The Court: No; it is not marked.

Mr. Schell: It is my recollection, probably in error, that it was not paid at the time of the last trial. Whether it has been paid since then I don't know.

The Court: Very well; it will be marked Plaintiff's [10] Exhibit 7 for identification for the forthcoming trial.

Are there any other documents that plaintiff proposes to use at the trial, Mr. Lincoln?

Mr. Lincoln: I am sorry, sir. There were two or three of these illustrated postal cards which I showed to counsel, but I am sorry I do not have them with me at the moment; and there was an additional circular which I thought was here, a circular which I have already exhibited to counsel,

both of which I would like to present. And Mr. Schell has some photographs which he would like to present, also, and we will stipulate that these were photographs taken on the trail. As to when or under what circumstances, of course, I think he should explain at the time of the trial.

Mr. Schell: Yes; we intend to.

The Court: All right. We have finished the plaintiff's exhibits, have we, now?

Mr. Lincoln: Yes, sir.

The Court: Now, Mr. Schell.

Mr. Schell: I have here seven photographs—I have another one, but that is a duplicate of one already in evidence. Four of these photographs show the mule “Chigger” with different people on board, so to speak.

The Court: Does the defendant have any exhibits which were introduced at the last trial?

Mr. Schell: No; there were not any because it was a [11] non-suit, you remember.

The Court: That is right.

Mr. Schell: So we never got to that point.

The Court: Very well; let us mark these for identification.

Mr. Schell: There were several more of that same type but I have not been able to locate them as yet.

The Court: Suppose you arrange these in the order in which you would like them to go in.

Mr. Lincoln: I don't think it makes any difference.

Mr. Schell: I don't think it makes any difference. I will just put them in this way: 1, 2, 3, 4.

The Clerk: A, B, C, D.

The Court: All right; they will be marked Defendants' A, B, C, and D. Those are various views of the mule in question.

Mr. Schell: That is right.

The Court: Do you stipulate that that is a fact?

Mr. Lincoln: I will stipulate that they are photographs. Of course, I do not recognize the mule. No, sir; I never saw it or him, whichever it is.

The Court: I assume there will be testimony on that.

Mr. Schell: Yes. There may be a couple more of those pictures.

Mr. Lincoln: That is all right. [12]

Mr. Schell: Then, here are some of the locus of the accident.

The Court: These depict the topography and general surface conditions along the trail at or about the point of the accident?

Mr. Schell: Yes. In other words, that is about the point where the plaintiff claims he involuntarily dismounted.

Mr. Lincoln: With the mule's assistance.

The Court: I do not suppose you recognize this scene?

Mr. Lincoln: No, sir; I do not. I am sorry. I never saw that, and I am afraid I would not recognize it, anyway.

The Court: Mr. Clerk, will you mark these three photographs as Defendants' exhibits next in order?

The Clerk: E, F, and G for identification.

The Court: E, F, and G purport to depict——

Mr. Schell: The locus.

The Court: ——of the scene were the accident occurred. Have you any others to offer, Mr. Schell?

Mr. Schell: No; nothing else, unless I will be able, before the trial, to find some more of the first type.

The Court: Yes. I do not mean to foreclose you. I would just like to get all of them marked as far as counsel can proceed respecting the trial.

The circular that is quoted from on page 3 of the stipulation, I assume is one of the circulars that has been [13] marked for identification.

Mr. Lincoln: I think not, sir. I have in mind that there was another circular which contained that phraseology, copy of which I showed to counsel during our discussions.

The Court: Apparently the caption is "Trail Trips into the Canyon."

Mr. Lincoln: Oh, yes; here it is.

The Court: I think the clerk might open that up for you.

Mr. Lincoln: Your Honor is quite right; it is in Exhibit A.

The Court: Exhibit 1, you mean, Plaintiff's Exhibit 1?

Mr. Lincoln: Exhibit 1, I should say; yes, sir.

The Court: Is there anything further that either of you gentlemen can suggest that we might dispose of today that will shorten the trial?

Mr. Schell: I can think of nothing further.

The Court: When would you like to try this case?

(Discussion as to time of trial omitted from transcript.)

The Court: Do you want to stipulate that the record made here this afternoon may be deemed a part of the record of the trial?

Mr. Lincoln: Yes; I think so.

The Court: Would you want to have the reporter write it up and file it to embody your stipulations? [14]

Mr. Lincoln: Yes, I think he should, your Honor.

Mr. Schell: All right; that is satisfactory.

The Court: Will it be stipulated that the cost of preparing the transcript will abide the event of the trial or be one of the costs of the trial?

Mr. Schell: Yes.

The Court: I would suggest that the reporter might hold it open and we will include whatever additional brief proceedings we may have, and then he can put it all in at the time of the trial. We might have a few more documents to mark and we can have them shown before the trial. I do not suppose there will be much additional.

Mr. Lincoln: I do not think so, do you?

The Court: Very well, then, it is stipulated by both of you that this may be a part of the record?

Mr. Lincoln: Yes, sir.

The Court: And that the cost of it will abide the event of the trial and it may be taxed as costs upon the conclusion of the trial.

Mr. Lincoln: So stipulated.

The Court: Is that your stipulation, Mr. Schell?

Mr. Lincoln: And that the present cost is to be shared by us equally.

The Court: Yes, sir. Is that so stipulated, Mr. Schell?

Mr. Schell: Yes, sir. [15]

Mr. Lincoln: Yes, sir.

The Court: Thank you, gentlemen. It will be April 29, at 10:00 o'clock, for further pre-trial.

(Whereupon, an adjournment was had until 10:00 o'clock a.m., Monday, April 29, 1946.)

* * * * *

Mr. Lincoln: Plaintiff is ready, sir.

Mr. Schell: The defendant is ready.

The Court: Is it stipulated, gentlemen, that the jurors are all in their places?

Mr. Lincoln: Yes, sir.

Mr. Schell: So stipulated.

EMMETT MYRON ENNIS

called as a witness by plaintiff, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Emmett Myron Ennis.

Direct Examination

By Mr. Lincoln:

Q. Where do you live, Mr. Ennis?

A. Grand Canyon, Arizona; Grand Canyon National Park.

(Testimony of Emmett Myron Ennis.)

Q. And about how long have you lived there?

A. Well, I first went to work there in April, 1907.

Q. For whom did you go to work at that time?

A. Fred Harvey.

Q. And you are still working for the Harvey Company?

A. I am.

Q. Or Fred Harvey, whichever you may call it?

A. I am.

Q. In 1942 you were working for the Fred Harvey Company, were you?

A. I was.

Q. In what capacity, Mr. Ennis?

A. Assistant manager of the transportation department.

Q. Did that have to do with these mule trips down to the canyon? [33]

A. It does.

Q. During the time that you were working for the Fred Harvey Company did you go down the Bright Angel Trail to the Colorado River from time to time?

A. Oh, probably between 1500 and 2,000 times.

Q. How wide across is the Grand Canyon there at El Tovar?

A. 11 miles.

Q. And how deep is it from the rim to the Colorado River?

A. About 4,800 feet.

Q. How long is the Bright Angel Trail?

A. Eight miles.

Q. There is another trail, too, isn't there, called the "Kaibab"?

A. There is the Kiabab Trail; yes, sir.

Q. How do you spell that, please?

A. K-a-i-b-a-b.

(Testimony of Emmett Myron Ennis.)

Q. Thank you. And where is that trail situated with reference to the Bright Angel Trail?

A. Three miles and a half east.

Q. Also, of course, starting from the south rim, that is, this same rim that the Bright Angel Trail starts from, is that right? A. It does. [34]

Q. Is that a longer or a shorter trail to the river? A. It is a shorter trail to the river.

Q. And about how much shorter?

A. Seven and one-half miles from the rim to the ranch.

Q. On the south rim of the Canyon was there at that time a hotel? A. There was.

Q. What is the name of that hotel?

A. The El Tovar.

Q. About how old was the El Tovar?

A. Built in 1904.

Q. I show you some postal card pictures and ask you if you can tell me what those may be pictures of?

Mr. Schell: I have not seen those pictures, counsel.

Mr. Lincoln: I am sorry. I thought I showed those to you.

Mr. Schell: You showed me so many things.

The Court: Have those been marked for identification?

Mr. Lincoln: No, sir; these are new ones. I am sorry. I thought I showed you these.

Mr. Schell: They are pretty pictures. I can't quite see the materiality of them, if the Court

(Testimony of Emmett Myron Ennis.)

please, as to this particular case. I object to them on that ground. I can't see where it is material. I think there is a dining [35] room in the hotel and the lobby.

Mr. Lincoln: Well, we felt——

The Court: Is there a pending question?

Mr. Schell: Yes, if your Honor please.

The Court: Please read it, Mr. Reporter.

(Question read by the reporter.)

The Court: You may answer.

A. That is a picture of the El Tovar Hotel taken from the east side.

The Court: Does the card state that it is a picture of the El Tovar Hotel?

The Witness: Yes, sir.

The Court: Do you wish those marked?

Mr. Lincoln: Please. Thank you.

The Witness: This is the El Tovar Hotel taken from the west, looking east. This is a picture of the lobby of the El Tovar Hotel, and a picture of the dining room of the El Tovar Hotel.

The Court: Let them be marked in the order identified by the witness as Plaintiff's Exhibits 1-A, 1-B, 1-C, and 1-D. Are there four only?

Mr. Lincoln: Yes, sir.

The Court: For identification.

Mr. Lincoln: Sir?

The Court: They are marked for identification. You [36] have not offered them into evidence yet.

Mr. Lincoln: Oh. Well, I now offer them, sir.

(Testimony of Emmett Myron Ennis.)

Mr. Schell: There is an objection, your Honor. I do not see the materiality.

The Court: Objection overruled. They may be received into evidence.

Q. (By Mr. Lincoln): I show you a photograph, Mr. Ennis. Can you tell me whether or not that is a photograph of the Grand Canyon?

The Court: Has that been heretofore marked?

Mr. Lincoln: It has not; no, sir. None of these which I am about to present, your Honor, have been marked.

A. That is a photograph of the Grand Canyon.

The Court: Let it be marked Exhibit 1-E for identification.

Mr. Lincoln: We will offer this, sir.

The Court: Received into evidence.

The Clerk: So marked.

Q. (By Mr. Lincoln): I show you now, Mr. Ennis, a colored picture, a double-page picture, and ask you if that picture on the front and also the pictures which are on the back of that are any place which you recognize?

Mr. Schell: May we have those, Mr. Lincoln, as to when they were taken and where, possibly?

Mr. Lincoln: Well, I can best answer that, your Honor, [37] by saying that these pictures were taken by myself from the August number of "Arizona Highways," published in 1947, a magazine.

The Court: The material time in this case is what things looked like in June, 1942.

Mr. Lincoln: Yes, sir. I am going to ask him that.

(Testimony of Emmett Myron Ennis.)

The Court: I think you might as well ask him with respect to all of these.

A. Those are all pictures taken of Grand Canyon and different parts of it.

Q. (By Mr. Lincoln): Has the Grand Canyon changed in its aspect since 1942?

A. Not to the material eye.

The Court: Do all these pictures you have identified up to this point fairly represent the things purported to be shown as they existed in June of 1942?

The Witness: I don't think there is anybody could pick out any difference.

The Court: Do you offer that double-page picture?

Mr. Lincoln: We offer the double-page one; yes, sir.

The Court: Received into evidence, and it will be marked Exhibit 1-F.

The Clerk: Yes, your Honor.

Q. (By Mr. Lincoln): I show you another colored picture which has upon the front of it the designation "Arizona Highways," August, 1947, and ask you if that, [38] together with the picture on the opposite side of it, is one which you recognize as being any portion of the Canyon?

A. The one with the "Highways" magazine is a picture taken from the south rim; the one on the other side is a picture taken from the north rim.

Mr. Schell: I wonder if you could speak just a little louder, please, Mr. Ennis?

The Witness: Yes, sir.

(Testimony of Emmett Myron Ennis.)

The Court: Would you like that last answer read?

Mr. Schell: No; I got it, but with some difficulty.

The Court: Do you offer that?

Mr. Lincoln: We will offer this, sir.

The Court: Received into evidence.

The Clerk: 1-G.

Q. (By Mr. Lincoln): I show you another colored picture with two smaller pictures on the obverse of it. Will you tell me, please, if you recognize that also as being some portion of the Grand Canyon? A. They are.

Mr. Lincoln: We offer this one, sir, please.

The Court: Received into evidence.

The Clerk: 1-H.

Q. (By Mr. Lincoln): I have another colored picture with two smaller pictures on the back of that one. Do you also recognize that as a portion of the Canyon? [39]

A. I do.

Mr. Lincoln: We offer that one, sir.

The Court: Received into evidence.

The Clerk: 1-I.

Q. (By Mr. Lincoln): Mounted upon a piece of paper, Mr. Ennis, I show you four colored pictures. If you recognize those pictures as being any portion of the Canyon, will you tell us, please, what portion of the Canyon they represent?

A. The picture in the top left-hand corner is a picture of Ribbon Falls; the top right-hand picture

(Testimony of Emmett Myron Ennis.)

is a picture of Indian Gardens; the picture in the lower left-hand is a picture taken of the River, looking down the Canyon; and the other one is a picture of the Canyon, taken from a trail.

Mr. Lincoln: Thank you. We offer this, sir.

The Court: Received into evidence.

Mr. Schell: Is that also from that magazine article?

Mr. Lincoln: Yes.

The Clerk: Marked 1-J.

Q. (By Mr. Lincoln): In 1942, Mr. Ennis, were you familiar with the general floor plan of El Tovar, the hotel itself? A. I was.

Q. Going from the main entrance into the general [40] lobby and looking toward the left was there at that time a small room where they sold the tickets to various excursions?

A. Known as the transportation desk.

Q. Yes.

The Court: Please talk a little louder, Mr. Ennis.

The Witness: Yes, sir.

Q. (By Mr. Lincoln): "Known as the transportation desk," you said? A. Yes, sir.

Q. And at that place did they sell tickets for a mule ride down from the south rim to Phantom Ranch and back again? A. They did.

Q. Do you remember what the charge was for that? A. \$18.00.

Q. That included the stopover at Phantom Ranch, a stopover at night at Phantom Ranch, didn't it? A. That was all the expense.

(Testimony of Emmett Myron Ennis.)

Q. And they also crossed the Colorado River?

A. It did.

Q. By the way, how wide is the Colorado River at that point? A. The bridge is 440 feet.

Q. From where did the mule trains, if I may use the expression—what did you call that excursion?

A. We called it the River Trip or the Phantom Ranch trip, either one. [41]

Q. From where did that river trip start?

A. The head of the Bright Angel Trail.

Q. In a corral there?

A. In a stone corral.

Q. I show you another colored picture—taken also, your Honor, from the same magazine. I might suggest that all the colored pictures which I present, except an ad, were taken from this same magazine, this same issue. Is that a picture of the corral that you just spoke of where they start from?

A. That is a picture of the loading corral at the head of Bright Angel Trail.

Q. And about as it was in 1942?

A. Just the same.

Mr. Lincoln: Thank you, sir. We will offer this, your Honor.

The Court: Received into evidence.

The Clerk: 1-K.

Q. (By Mr. Lincoln): How many people are there in a party or, shall we say, in a string? Is that the way you describe it?

A. In a string. Whatever there is to go up to 10 people.

(Testimony of Emmett Myron Ennis.)

Q. Not more than 10?

A. Not more than 10. [42]

Q. And does each one have a guide?

A. They do.

Q. Where is the guide with reference to the head or the tail of the string?

A. He always leads the party.

Q. So that none of the persons—I believe you call them “dudes,” don’t you? A. Correct.

Q. That is, any person who is not the guide is a dude? A. He is a dude.

Q. It doesn’t make any difference whether he is a cowboy or an employee of the Harvey Company or some stranger, is that right?

A. As long as he is not working for the transportation, he is a dude.

Q. I see. So that none of these dudes, then, would be able to get ahead of the guide, is that right? A. That is right.

Q. And the guide keeps the pace so that none of them can go any faster? A. That is right.

Q. But some of them do, I suppose, on occasions perhaps go a little slower. is that right?

A. That is right. [43]

Q. In which case what does the guide do?

A. Stops and waits until they catch up, and tries to get them to ride their mule up and keep up with the rest of the party.

Q. How wide is this Bright Angel Trail?

(Testimony of Emmett Myron Ennis.)

A. Oh, anywheres from four feet to 10 or 12 feet in places.

Q. That is where they have turn-outs, isn't it?

A. Not necessarily.

Q. But the great majority of the distance is about four or five feet wide, would you say?

A. About that; yes, sir.

Q. Now, these mules which you have there, who selects the mule originally? I mean by that who buys the mule originally?

A. Well, at that time the manager that was there ahead of me bought the mules, Mr. Shirley.

Q. Is he here today?

A. No. Mr. Shirley passed away.

Q. And after the mules were purchased what was done with them?

A. They was broke to pack and ride, and ride by the guides or packers.

Q. Tell us, please, Mr. Ennis, what you mean by "pack." [44]

A. Well, we have to pack all the stuff that goes into the Grand Canyon and to Phantom Ranch goes down on mules, hay, grain, food, everything goes down on mules. These mules are put in the pack train until they are gentle and can know how to handle themselves on the trail. Then the packers start in to ride them, then the guides ride them and eventually they get into the dude string.

Q. When do they get into the dude string?

A. Whenever the trail foreman satisfies himself that they are safe for dudes to ride.

(Testimony of Emmett Myron Ennis.)

Q. How long a period, that is, how long a period in time does it ordinarily take a mule from the time that he is purchased to the time that he is fit to go into the dude string?

A. That all depends on the mule. Anywheres from eight months to two years.

Q. The packing which you speak of is usually done on that other trail, the Kaibab Trail, isn't it?

A. Most of the time; not always. They are packed on both trails.

Q. Do you know this mule Chiggers?

A. I do.

Q. How long have you known it? I believe a mule is an "it," isn't it, neither a male nor a female?

A. Well, that all depends on the company we are in. [45]

Q. In any event, how long have you known this animal? We will call it that. A. Since 1938.

Q. That was when it was first purchased for the Harvey Company? A. That is right.

Q. Do you know what was done with the mule after that?

A. He went through the regular training period.

Q. Do you know that of your own knowledge or own memory of him? A. I do.

Q. How long had he been on the Bright Angel Trail carrying mules (dudes) up to June of 1942?

Mr. Schell: You mean "dudes."

The Witness: Carrying what?

(Testimony of Emmett Myron Ennis.)

Mr. Lincoln: I beg your pardon. I beg pardon. Carrying dudes, up until 1942?

A. He went on the dude trail, I believe, in 1940, that is, as a dude mule.

Q. Yes. Was he on there fairly constantly from that time on until 1942? A. He was.

Q. Wasn't there some time during which there were no excursions at all by reason of certain governmental regulations? [46]

A. The Government never regulated the mules.

Q. No. But didn't they regulate the excursions going up and down? A. No.

Q. You continued your excursions the entire time? A. All during the war.

Q. From 1940 to '42. One of those pictures, Mr. Ennis, you said was a picture of Indian Gardens. Where is Indian Gardens with reference to the Bright Angel Trail?

A. It is on the Bright Angel Trail.

Q. And about how far from the rim?

A. Four and one-half miles.

Q. That is, figuring the circuitous route?

A. That is right; that is the trail mileage.

Q. Not straight down, of course?

A. That is trail mileage.

Q. And it follows the contour of the hill or mountain, whatever it is there, doesn't it?

A. Well, it is shot out in the most feasible places.

(Testimony of Emmett Myron Ennis.)

Q. I am showing you a colored photograph, Mr. Ennis, and ask you whether or not that is a representation of any portion of the Bright Angel Trail as it was in 1942?

A. No; that is not the trail in 1942.

Q. I show you another one and ask you this same question with regard to that. [47]

A. That is Jacob's Ladder on the Bright Angel Trail.

Q. Is that as it was in 1942?

A. That is an old, old picture.

Q. I see. So that that does not represent it in '42?

A. No, sir.

Q. All right; we don't want it then. I show you now three photographs and ask you if any one of those represents the Bright Angel Trail as it existed in '42?

Mr. Schell: Just a moment. Is that part of the trail where this occurrence occurred, Mr. Lincoln, or just some part of the trail?

Mr. Lincoln: It is a part of the trail itself. Where this occurrence occurred.

Mr. Schell: If it is just some other part of the trail, we do not see the materiality of it, if the court please. Object to it on that ground. Pictures of the place where the accident occurred is one thing.

The Court: Overruled. You may answer.

A. Those pictures are taken of the Kaibab Trail.

Q. (By Mr. Lincoln): I show you another photograph which appears to be a photograph of a river. Do you recognize that one?

(Testimony of Emmett Myron Ennis.)

A. That is the river at the foot of the Bright Angel Trail. [48]

Mr. Lincoln: We will offer that picture, your Honor.

The Court: Received into evidence.

The Clerk: 1-L.

Q. (By Mr. Lincoln): I show you some other colored pictures and ask you if you recognize these—there are five of them—as being any portions of the Bright Angel Trail as it existed in 1942?

A. Those three are as the trail now exists.

The Court: Do they fairly depict those portions of the trail as they existed in June of 1942?

The Witness: Yes, sir.

Q. (By Mr. Lincoln): And the others do not?

A. No, sir.

Mr. Lincoln: May we offer these three, your Honor, in sequence?

The Court: Each shows a different portion of the trail, does it?

The Witness: That is right.

The Court: Are they otherwise identifiable in any way?

Mr. Lincoln: As to what portions, you mean, your Honor, or does your Honor mean whether they were taken from the same magazine?

The Court: So that we can identify them in the record to distinguish one from the other. [49]

Mr. Lincoln: Mr. Somers, your Honor, is going to mark each one by a different exhibit number.

(Testimony of Emmett Myron Ennis.)

The Court: Very well. The three last identified by the witness will be received into evidence and marked Exhibit 1——

The Clerk: 1-M, 1-N, and 1-O, your Honor.

The Court: We will take the morning recess at this time. You may step down, Mr. Ennis.

(The court admonished the jury and, as the jury was retiring from the courtroom, Juror Upson addressed the court privately.)

The Court: Did the reporter get that?

The Reporter: I could not hear it, your Honor.

The Court: If you want to ask that, Mr. Upson, you ask it after the recess.

Juror Upson: To whom do I ask it?

The Court: You ask the question you were going to ask now. You may ask that when the jury comes in after recess.

Juror Upson: And I address you?

The Court: Yes, sir.

Juror Upson: Thank you.

The Court: So all may hear. All members of the jury are entitled to hear all proceedings of the case.

Juror Upson: That is what I wanted to know. Thanks.

The Court: Recess for five minutes. [50]

(Short recess.)

(Testimony of Emmett Myron Ennis.)

The Court: Is it stipulated, gentlemen, that the jurors are all in their places?

Mr. Lincoln: Yes, sir.

Mr. Schell: So stipulated.

The Court: Proceed.

Q. (By Mr. Lincoln): Mr. Ennis, will you tell us a little about this Indian Gardens, that is, where it is and what it looks like?

A. Well, we call it halfway down the Bright Angel Trail to the river. There is a big bunch of Cottonwood trees there; there is a pump house where we pump our water from the Gardens back to the top of the hotel and all uses; stables there, hitch racks to tie the mules to. It is just a regular rest spot from going down and coming back.

Q. The dudes have a lunch down there, do they, in going down?

A. The river parties eat their lunches at the river; the Phantom Ranch parties eat theirs at Indian Gardens.

Q. But the river party, as you call it, that is the party which goes down——

A. It goes down and back the same day.

Q. They just stop there but do not eat, is that right? A. No. [51]

Q. Are the mules watered there or do they eat there? A. They are watered there.

Q. And that is all? A. That is all.

Q. About how long a stop is usually made there?

A. Well, that all depends on the party and the conditions; in other words, from an hour to an hour and a half.

(Testimony of Emmett Myron Ennis.)

Q. I believe you said that you did know this particular mule Chiggers? A. I do.

Q. Have you ever ridden it yourself?

A. I have.

Q. Down the trail and back?

A. Down the trail and back.

Q. More than once? A. Several times.

Q. In the winter time are the mules still used on the trail or are they sent out to grass or to pasture?

A. We keep enough mules there in the winter time to take care of the winter business; the rest of the mules go to winter pasture.

Q. Do you know whether or not Chiggers was on winter pasture before this accident in '42?

A. He was. [52]

Q. How long had he been on the pasture?

A. Oh, I can't—well, probably went down in October and come back there around the middle of May.

Q. Was this the first trip which he had made this season? A. It was.

Q. We were speaking a little while ago about a place there in El Tovar in the hotel where they sold tickets for these trips. I show you what seems to be a circular and ask you if you remember whether or not this circular was being distributed at that excursion office, if I may use the term, during 1942?

Mr. Schell: Do you mean the transportation desk?

Mr. Lincoln: Yes. Thank you for the better designation, Mr. Schell.

A. Yes; it was.

(Testimony of Emmett Myron Ennis.)

Mr. Lincoln: We will offer that circular, your Honor.

The Court: Is that the circular heretofore marked an exhibit for identification?

Mr. Lincoln: Yes, sir. This was heretofore marked Exhibit No. 2, sir.

The Court: 2?

Mr. Lincoln: Yes, sir.

The Court: It will be received as Exhibit 2 into evidence. [53]

Q. (By Mr. Lincoln): I show you another paper which also seems to be a circular and ask you whether or not you recognize that as being a circular distributed by the transportation desk in the summer of 1942?

A. We kept those in the racks for everybody to help themselves.

Q. That is, they were distributed all over the hotel, is that right?

A. All over the Canyon.

Mr. Lincoln: All over the Canyon. We will offer this, your Honor. This has heretofore been marked Exhibit No. 1.

The Court: It will be received into evidence and marked Exhibit 1-P.

Mr. Schell: I did not hear that last number.

The Court: The next letter, Mr. Clerk?

The Clerk: 1-P.

The Court: The circular was heretofore marked on the pre-trial as Exhibit 1.

Mr. Lincoln: Your witness, Mr. Schell.

(Testimony of Emmett Myron Ennis.)

Cross-Examination

By Mr. Schell:

Q. Mr. Ennis, you have been working for Fred Harvey at the Canyon since 1907?

A. I started work for him the first time in April in 1907.

Q. And you have worked for him continuously since that time?

A. There was three different times I worked for him. I went to World War I and did not come back until April, 1921.

Q. When you first started working there what was the type of work you did?

A. I started in as a guide.

Q. And as such guide did you frequently go up and down that trail?

A. I did.

Q. Who maintains this Bright Angel Trail?

A. It is maintained by the U. S. Government, the National Park Service, Department of the Interior.

Q. Do you or does the Government have men stationed there near the Bright Angel Trail?

A. They have men practically every day that drops over there; they are rangers; at the starting time of the trail trips.

Q. Do your trail trips work under the supervision of these rangers?

Mr. Lincoln: Objected to as calling for a conclusion of the witness and entirely immaterial.

The Court: Sustained in that form. [55]

(Testimony of Emmett Myron Ennis.)

Q. (By Mr. Schell): Does the Government, the Park Service, maintain a camp in the general vicinity of the El Tovar Hotel?

Mr. Lincoln: Objected to as being immaterial.

The Court: Overruled.

Mr. Lincoln: Not proper cross-examination.

The Court: Overruled. He may answer.

A. They do.

Q. (By Mr. Schell): And where is that located?

A. It is southwest—or southeast of the head of the trail.

Q. How many men do they keep around there, approximately?

A. It would be just an estimate.

Q. Well, give us your best estimate.

A. Oh, I would say the Park Service has in the neighborhood of 75 employees the year 'round.

Q. When these trail trips start out what is the custom there with reference to the Government men being present or otherwise?

Mr. Lincoln: Object to that—just a minute, please, Mr. Ennis. We will object to that as being entirely immaterial, not proper cross-examination. I respectfully submit, your Honor, we are not criticizing the Federal Government; we are not criticizing anybody but the Harvey [56] Company.

The Court: What would be the purpose of it, Mr. Schell?

Mr. Schell: Just to show that the general thing is supervised by the Government and they approve of the methods used in the handling.

(Testimony of Emmett Myron Ennis.)

The Court: Is there any contention here that the Government had anything to do with these trips?

Mr. Schell: No. Not to that effect, no; just that the Government supervises the operation, as in the National Parks, checks them and sees that they are conducted in accordance with Government standards.

The Court: Is there any contention that any agency of the Government had anything to do with these mules or this trip?

Mr. Schell: I do not think this particular trip, except they do check to see what is the training of the mules, etc.

The Court: Sustained.

Q. (By Mr. Schell): The Bright Angel Trail referred to, is that the same as it was when you first came there or has it changed?

A. It has changed.

Q. And changed before 1942? A. It was.

Q. And Indian Gardens, you say, is approximately half [57] way to the river?

A. Approximately.

Q. Where did this particular trip, this Phantom Ranch trip, go? Just tell us after it gets down to the river, what does it do?

A. It goes up what is known as the river trail which intersects the Kaibab Trail, crosses the Kaibab bridge on over to the banks of Bright Angel Creek and up to the ranch.

Q. With reference to the training of the mules, is that under your supervision generally?

(Testimony of Emmett Myron Ennis.)

A. Generally, yes; but it is directly under the trail foreman, which is my assistant or general foreman.

Q. Just a little louder, please.

A. Generally under me, but the direct training comes under the trail foreman, one of my assistants who is directly responsible for the mules.

Q. During the summer approximately how many trips do you make down during the months, say, June, July, and August, per day down that trail?

A. You mean how many people do we take down?

Q. Yes.

A. Well, that varies. Anywheres from 50 up to 80.

Q. You say that the mules are first started in on packing. Will you explain just what course the mules are put through in training? [58]

A. Well, when the mules are first brought to the Canyon they are broke to ride, and then they have pack saddles put on them. We tie canvas on each side, tie an old automobile tire on the side, something that will flop around, and then let them run and kick until they get tired of it, until they get used to that stuff hanging there. We hang everything in the world that we can find on there that would scare a mule until he gets used to having them. Then he is taken out to the pack train, and the first few trips the mule is soft and he goes down the trail light, just the saddles on, and then they put a little load on him. Finally, they get him hard-

(Testimony of Emmett Myron Ennis.)

ened in and gentled down to where they can put the usual 150 pounds on the mule and go down and back. And the guides that is with the pack train, at that time they start in as quick as the mule begins to gentle real gentle, they will ride one mule down to the ranch under pack and then he will saddle up another mule and ride him back. Sometimes they will ride two mules on the way back, change. So finally, the packer decides that the mule is gentle enough for a guide to ride. He is brought to town and he rides him in and out of the Canyon trail until the guide decides that the mule is gentle enough for dudes. He tells Mr. Bradley. Mr. Bradley will watch the mule a few days, maybe ride him himself, make a trip on him, and he will decide that the mule has got gentle enough to carry [59] dudes, and then he will put a dude on him. And they always put him next to the guide and the guide will watch him a day or two, and finally he just works right in.

Q. This particular mule Chiggers, you say you have known him since '38, when he came to the Canyon. Is the mule still Chiggers?

A. He is.

Q. Do you still use him?

Mr. Lincoln: Objected to as immaterial.

A. Still in use.

The Court: Sustained.

Mr. Lincoln: May the answer go out, please?

The Court: The answer is stricken.

Mr. Lincoln: And the jury instructed not to consider it.

(Testimony of Emmett Myron Ennis.)

The Court: The jury is instructed to disregard the testimony at present. The issue is in 1942.

Q. (By Mr. Schell): Do you know what the mule did in 1938 and '39?

A. In 1938 and '39 he was on the pack train.

Q. Did he ever go into the dude string?

A. He went into the dude string in '40.

Q. Did he work in the dude string in 1940 and '41? A. He did.

Q. What did you observe about this particular mule Chiggers? [60]

A. Well, my attention was called to Chiggers by the packers when he first come out there. The packer was bragging about what a gentle mule he was and what a pet he was making.

Mr. Lincoln: We ask that the remarks of the packer to this witness be stricken out as being hearsay.

The Court: Motion denied.

Q. (By Mr. Schell): Then did you have occasion to ride him?

A. I think I rode him the first time in '40 to the Phantom Ranch on a fishing trip.

Q. And what did you observe about the mule?

A. He was a very gentle mule. You could get off of him any place on the trail and, without a rope, he would follow you, or you could drop it and he would stand.

Q. Did you see the mule from time to time, then, after 1940 and '41?

A. Every few days, whenever I happened to be around the barns or over to the corrals.

(Testimony of Emmett Myron Ennis.)

Q. Did you ever see the mule do anything out of the ordinary during all that time?

A. I never did.

Mr. Lincoln: We certainly will object to this line as immaterial. So far as that phase of it is concerned, I would like to be heard on the question, perhaps properly [61] without presenting such thoughts as I have on that matter before the jury.

The Court: The answer is in.

Mr. Lincoln: Pardon me, sir. I did not understand the answer was in. If it is in, may it be stricken out for the purpose of attacking it by my objection?

The Court: Yes; the answer may go out for that purpose. Will you read the question, Mr. Reporter?

(Question read by the reporter.)

The Court: Your objection?

Mr. Lincoln: We object to it as being entirely immaterial. Our position with relation to that, your Honor, is that it does not make a bit of difference if a man drives an automobile for years and years, but yesterday he was in an accident.

The Court: Objection overruled. The answer may stand.

Mr. Lincoln: Was there an answer there, Mr. Reporter?

(Answer read by the reporter.)

Mr. Lincoln: Thank you.

Q. (By Mr. Schell): So far as your observations of the mule are concerned from the time you

(Testimony of Emmett Myron Ennis.)

first observed him up until—well, June 17, 1942, what did you observe with reference to the conduct of the mule?

A. He proved himself to be a very kind, level-headed, quiet mule. [62]

Q. With reference to the training of mules generally, have you always worked in the transportation department during the time that you were with Fred Harvey? A. I have.

Q. Have you had occasion to observe mules, say, that have been worked and then are put to pasture and then reworked again? A. Every year.

Q. What has been your observation, if anything, whether or not there is a difference with mules after they have been to pasture from what they have been before?

Mr. Lincoln: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

A. Any mule that is trained on that trail, he doesn't forget his training. He comes back to the Canyon there in the spring of the year and he is shod, and he runs on pasture all winter without shoes. The first thing that is done is shod, and then he is put on a two-day trip, which is an easy trip. The mule is too soft to make the round trip up and down the Canyon in one day; so he is put on the two-day trip, and that is the way they are hardened up to the trail.

(Testimony of Emmett Myron Ennis.)

Q. Did you ever find them unmanagable or anything after they have been on pasture? [63]

A. Never.

Q. Are you familiar, Mr. Ennis, with the equipment that is on these mules or was on them—I am referring in all my questions to 1942?

A. I am.

Q. What does the dude mule have?

A. He has the saddle blanket, cinches, bridle, halter and rope.

Q. Does this bridle have reins on it?

A. It does.

Q. On all of them? A. On all of them.

Q. What is the purpose of those reins?

A. They are for the rider to help the mule and control the mule. All riders—when the man that mounts them, is told to put them on a mule and they fit their stirrups to them the right length, and tell them, now, not to get off that mule until the guide gets there, to stay on, to hold the reins in their hands at all times, and every rider is instructed that way, to please observe what they are told by their guide.

Mr. Lincoln: We ask that the testimony of this witness with relation to what every person is told be stricken out as being hearsay and also not responsive to the original question. [64]

The Court: Motion denied.

Mr. Schell: That is all at this time.

(Testimony of Emmett Myron Ennis.)

Redirect Examination

By Mr. Lincoln:

Q. Mr. Ennis, really, when you come to consider this mule Chiggers he was a sweet, kindly, gentle little fellow, wasn't he? A. He was.

Q. How much did he weigh?

A. Around 900.

Q. How do you distinguish as to which person shall ride which mule?

A. That all depends on the trail foreman and the guides, and the weight of the people and the load that the mule carries.

Q. Do you put the smaller person on a smaller mule and the larger person on a larger mule?

A. Not always.

Q. What makes the distinction?

A. Some large mules doesn't handle as big a load as a small mule.

Q. How did this Chiggers operate in that regard; did he handle a large load?

A. He will handle a pretty good load when he is [65] hardened up.

Q. Do you call him a large mule or a small mule?

A. He is a small mule.

Q. Had he been somewhat a sort of a pet among your people there? A. He was.

Q. How would you describe his actions before this day in June that we are supposed to have the difficulty with him?

A. Well, I don't quite get your question.

(Testimony of Emmett Myron Ennis.)

Q. Well, you say he was a pet. What did you do to make him a pet?

A. Well, you don't do anything. The mules is that way; they are just naturally a pet.

Q. Just naturally his particular disposition, is that right? A. That is right.

Q. Mules have different dispositions as much as people, I suppose, don't they?

A. Just the same.

Mr. Lincoln: I think that is all.

Mr. Schell: There is one other question, if I may, please. [66]

Recross-Examination

By Mr. Schell:

Q. Do you know of your own knowledge whether or not women and children had ridden Chiggers?

A. They had.

Q. Down the Canyon? A. Yes, sir.

Q. Did you ever have any trouble with him at all? A. No, sir.

Mr. Lincoln: Wait a minute. We certainly object to that.

The Court: Sustained in that form.

Mr. Schell: That is all at this time.

Mr. Lincoln: If that answer went in, your Honor, may it be stricken out and the jury instructed to to disregard it?

The Court: The answer is stricken and the jury is instructed to disregard it. You may put the question with respect to some definite time.

(Testimony of Emmett Myron Ennis.)

Q. (By Mr. Schell): Prior to June 17, 1942, did you ever have any difficulty with the mule?

A. We never did.

Mr. Lincoln: The same objection.

The Court: The objection may be deemed made and the answer will stand.

Mr. Upson, you had a question? [67]

Juror Upson: The question has been asked by the testimony.

The Court: You had a question to ask the court.

Juror Upson: The question I had to ask has been answered by this testimony.

The Court: Did you desire to ask the court?

Juror Upson: No; I do not need to. It has been answered by this question.

The Court: Any of the jurors have any questions to ask Mr. Ennis?

Juror Dorr: I would like to ask him one, your Honor. In the operation of this Chiggers——

The Court: You are Mr.——

Juror Dorr: Mr. Dorr.

The Court: Oh, yes, Mr. Dorr.

Juror Dorr: In the operation of Chiggers in this string had he previously been back in the string as No. 7?

The Witness: Well, more than likely he was, yes; because they don't have no specific place to put a mule at in the string. When the string is made up, the dudes go into the Canyon and ladies is all put next to the guide, and then the men bring up the rear. That is to give the guide a better chance to watch the women, because it is naturally

(Testimony of Emmett Myron Ennis.)

assumed that the women is more apt to get scared or have a faint spell when they come to these steep places than men [68] is, and they are put up there so the guide can get to them quicker.

Juror Dorr: Had he at times headed the string or been up close to the foot of the string?

The Witness: Oh, yes; he had headed the string when the packers or guides was riding him.

The Court: Any other questions? You may step down.

Mr. Lincoln: May I have one question further, your Honor?

Q. Do you know, Mr. Ennis, of your own personal knowledge whether Chiggers had ever been the last in the string before? I mean by that, had you ever seen him as the last one in the string?

A. I haven't.

Mr. Lincoln: That is all.

The Court: You may step down, Mr. Ennis.

Mr. Lincoln: Mr. Mateas, please.

ELMER H. MATEAS

the plaintiff herein, called as a witness in his own behalf, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Elmer Mateas. [69]

Direct Examination

By Mr. Lincoln:

Mr. Mateas, your Honor, is quite deaf and uses one of these deaf person's apparatus; so it may be

(Testimony of Elmer H. Mateas.)

necessary for me, if I may be permitted, to approach nearer to him in order that he may hear me.

Q. Can you hear me from here?

A. I can hear you but not too well. That is, I can hear you and I may misunderstand your question or something.

The Court: Do you hear normally with the hearing aid you are wearing?

The Witness: Yes, sir.

The Court: I would suggest you stand back there at the lectern, Mr. Lincoln. And if you do not understand the question, say so.

The Witness: Yes, sir.

The Court: And he will repeat it.

Mr. Lincoln: I will try to talk louder.

Q. Mr. Mateas, how old were you in 1942?

A. 31.

Q. And up to that time what had been your business?

A. I was a contractor.

The Court: Can you speak louder?

A. I was a lath and plaster contractor.

Mr. Lincoln: May I ask the jurors, your Honor, if he [70] spoke loud enough so that numbers 1 and 7 may hear him?

A Juror: A little louder.

Mr. Lincoln: Juror No. 1 and other jurors say, Mr. Mateas, that they can't hear you, especially these at the end of the jury box. Will you talk louder, please, and talk so that I can hear you over here, please?

(Testimony of Elmer H. Mateas.)

The Court: You said your business had been plastering contractor?

The Witness: Plastering contractor; yes, sir.

The Court: Keep your voice up so all of us can hear you.

The Witness: In 1941 I was a plastering contractor. Is that better?

Q. (By Mr. Lincoln): Before 1942 had you ever been to the Grand Canyon?

A. I had been to the Grand Canyon.

Q. And what year was it that you went there first? A. 1941.

Q. At that time did you take a mule ride down the Canyon? A. No, sir.

Q. Did anybody accompany you in 1941?

A. 1941?

Q. Was anybody with you in 1941?

A. My wife. [71]

Q. This lady who sits here? A. Yes, sir.

Q. In the front row? A. Yes, sir.

Q. And in 1942 was anybody with you?

A. My wife, again.

Q. From where did you come to go to the Canyon in 1942?

A. I did not understand that question.

Q. Where did you live in 1942?

A. In El Monte.

Q. And how did you get to the Canyon from there? A. We drove in our own car.

The Court: Can you hear, Mrs. Anderson?

Juror Anderson: Not too well.

(Testimony of Elmer H. Mateas.)

The Court: Suppose you face the jury as much as you can and speak louder.

Mr. Lincoln: May I stand over here, your Honor, and perhaps I can get the voice thrown in this direction more.

The Court: Where you are standing now will be satisfactory.

Mr. Lincoln: Thank you.

Q. You say you went there in your car?

A. Yes, sir.

Q. Who drove the car all the way? [72]

A. I did.

Q. Do you remember what day you arrived at Grand Canyon in 1942?

A. We arrived on Tuesday.

Q. Pardon? A. Tuesday.

Q. What day of the month was that?

A. June 16th.

The Court: June 16th?

The Witness: June 16th.

Q. (By Mr. Lincoln): What time of the day did you arrive on the 16th?

A. Some time in the evening, about 4:00 or 5:00 o'clock.

Q. You and your wife, did you remain over night at the Canyon at the El Tovar?

A. No; we were not at the hotel. We were in one of these—oh, like an auto court.

Q. Like an auto court? A. Yes, sir.

Q. Did you go to the hotel that evening?

A. Yes, sir.

(Testimony of Elmer H. Mateas.)

Q. And did you go to what is called the transportation bureau? A. Yes, sir. [73]

Q. Calling your attention to Plaintiff's Exhibit No. 2, that being a circular which has been identified by Mr. Ennis, did you see that circular at that time? A. Yes, sir.

Q. Is that the original circular which you procured at that time?

A. Well, I don't know whether it was the same one or not, but it was identical to it.

Q. I also show you a circular which has been marked No. 1-P in evidence, and ask you whether or not you saw that circular? A. Yes, sir.

Q. At that time, or one like it?

A. Yes, sir.

Q. Do you know whether or not you read the circular which you now have in your hand, No. 1-P?

A. Yes, sir.

Q. At that time?

A. I read all the circulars.

Q. Now I call your attention to a particular clause in this circular headed "Trail Trips Into the Canyon."

"To be fully appreciated, the Grand Canyon must be seen from both top and bottom—from the inside as well as from the outside. For exploring the inner recesses of the chasm, several safely constructed [74] trails have been built by government engineers.

"Although visitors may venture short distances down these trails on foot, the accepted

(Testimony of Elmer H. Mateas.)

mode of travel for longer journeys is via the famous 'Grand Canyon Mules.' These faithful, sure-footed animals, in charge of experienced guides, hold a thirty years' record of carrying many thousands of inexperienced riders down the trails and back in perfect safety."

Did you read those clauses which I have just read to you?

A. Yes, sir; I read it myself. It was pointed out to me.

Mr. Schell: I beg pardon. I did not hear the answer.

Mr. Lincoln: I did not, either.

The Court: Please read it, Mr. Reporter.

(Answer read by the reporter.)

Q. (By Mr. Lincoln): When you went to this transportation bureau was anybody with you?

A. My wife.

Q. Did you have any talk there?

A. I did.

Q. With the man in charge of the bureau?

A. Yes, sir.

Q. Was that talk in relation to the trip down the Canyon? [75]

A. Yes, sir.

Q. What, if anything, did you tell him?

A. I told him I was not experienced in riding either horses or mules.

Q. That you were not an experienced rider?

A. That I was not an experienced rider; yes, sir.

Q. As a matter of fact had you ever ridden on a horse in your life?

A. No, sir.

(Testimony of Elmer H. Mateas.)

Q. Or a mule? A. No, sir.

Q. Up to that time? A. No, sir.

Q. Did you tell this guide, this bureau attendant that? A. I told him that.

Mr. Schell: Just a moment. We object to these questions as leading and suggestive.

The Court: I suggest you frame them differently, Mr. Lincoln.

Q. (By Mr. Lincoln): What, if anything, did the attendant say to you in return?

A. I do not quite get that question.

Q. What answer did he make to you?

A. He told me that probably 75 per cent of the [76] people had never been on a horse or a mule before until they had made the trip.

Q. Did you believe him? A. Yes, sir.

Q. When you read this circular did you believe that? A. Yes, sir.

Q. Did you buy a ticket based upon your belief?

A. I did.

Q. And did you pay for the ticket?

A. Paid for it. I had two tickets.

Q. Two tickets. When was the trip that you were to take on these tickets?

A. 11:00 o'clock the next morning.

Q. The next morning? A. Yes, sir.

Q. And at 11:00 o'clock the next morning where were you?

A. We was at the corral at the head of the trail.

Q. Was that the corral which had the stone fence around it? A. Yes, sir.

(Testimony of Elmer H. Mateas.)

Q. And when you got to the corral, what did you see?

A. Well, there was a lot of mules in there and other people around.

Q. A lot of mules and other people around? [77]

A. Right.

Q. Right.

A. A lot of mules, also other people, mules and people.

Q. Mules and people. Did you notice any other party? By that I mean an entire string of persons who were about to leave?

A. There was a party already there when we arrived.

Q. And did it go before you left?

A. They left ahead of us.

Q. Did you notice how many persons were in that party?

A. It is kind of hard to say, because our party was starting to arrive as that party was ready to leave. It would be hard to tell.

Q. How many persons were there in your party altogether, counting the guide?

A. There was six besides myself; that is seven total.

Q. Seven, and then the guide besides, is that right?

A. No, sir; seven including the guide.

Q. Seven including the guide?

A. Yes, sir.

Q. Did you notice any other persons in your party getting on the mules?

(Testimony of Elmer H. Mateas.)

A. I noticed they were all mounting approximately one after the other. [78]

Q. Did you get onto the one mule yourself?

A. No, sir. The mule was picked out for me.

Q. There was a mule picked out for you?

A. The mule was picked out for me.

Q. How was it picked out?

A. Well, the trail master——

Q. And a little louder, Mr. Mateas, too, please.

A. The trail master would just eye up the people in the party and pick out a certain person and put him on a particular mule.

Mr. Lincoln: Mr. Reporter, will you please repeat that answer?

(Answer read by the reporter.)

Q. How did he do that to you? What did he do or what did he say to you?

A. Oh, he just looked around and said, "You take this one," and he gave me a particular mule, and that was that.

Q. Do you see the trail master anywhere in the courtroom? A. Yes, sir.

Q. Do you remember what his name was?

A. Mr. Bradley.

Mr. Lincoln: May we ask, your Honor, that Mr. Bradley stand up? [79]

(A gentleman standing.)

Mr. Lincoln: Thank you.

Q. That is the gentleman that has just stood up, is it? A. Yes, sir.

(Testimony of Elmer H. Mateas.)

Q. Where were you in the string, which number in the string? A. I was on the end.

Q. The last one of the string?

A. The last one.

Q. Was anything said to you with relation to the reins of the mule?

A. Yes, sir; I was told to hold the reins in my hands at all times.

Q. What was the cause of that?

Mr. Schell: Just a moment. That is objected to as calling for conclusion and speculation.

Mr. Lincoln: That may be withdrawn. You are quite right. It may be withdrawn.

Q. Did you observe that the other members of the party were holding their reins in any manner different from what you were?

Mr. Schell: That is objected to as immaterial.

A. Some of them did not hold their reins.

Mr. Lincoln: Wait a minute. [80]

The Court: Did you say "all other members of the party?"

Mr. Lincoln: Some of the members of the party, sir, I may have said "all," but if I did, I did not intend it.

The Court: "Were holding their reins in a different manner?"

Mr. Lincoln: Yes, sir.

The Court: How would that be material?

Mr. Lincoln: Well, if your Honor would permit that question, I think your Honor will observe or will see its materiality. I would rather not sug-

(Testimony of Elmer H. Mateas.)

gest for the moment, because I think it would not be fair to the witness nor to the jury.

The Court: Sustained in that form. You may rephrase it.

Q. (By Mr. Lincoln): Did you see other members—— A. Yes, sir.

Q. ——of your party hold their reins in a manner different from what you were holding yours?

A. Some of them were not holding them——

Mr. Schell: Objection; the same question.

The Court: Sustained in that form.

Mr. Schell: I move that answer go out.

The Court: The answer is stricken and the jury is instructed to disregard it. [81]

Q. (By Mr. Lincoln): Did you have any conversation with the trail master regarding the manner in which you should hold your reins?

Mr. Schell: Objected to as already asked and answered, and conversation given.

The Court: Overruled.

Mr. Lincoln: Just answer that yes or no, please.

A. Not exactly conversation; no, sir.

Q. What?

A. He told me to hold my reins or let mine lay idle like some members had been doing and put a twist on the saddle horn; and I did the same and I was told to hold the reins at all times. There wasn't any conversation concerning it.

The Court: Read the answer. Suppose you speak up, Mr. Mateas.

The Witness: Yes, sir.

(Testimony of Elmer H. Mateas.)

The Court: Talk to the back of the room back there as best you can.

(Answer read by the reporter.)

Mr. Schell: Stipulate that picture may go in and produce Chiggers to the court and jury at this time.

Mr. Lincoln: Yes, sir; this was marked Exhibit 4. May we then also stipulate, your Honor, that this is a photograph of the party on which Mr. Mateas was one of the [82] riders, taken on that June 17, 1942, just at the beginning of the excursion?

Mr. Schell: So stipulated.

The Court: Very well. Do you offer it in evidence?

Mr. Lincoln: We will offer this; yes, sir.

Q. Do you know the names of the persons who were in your party? A. Yes, sir.

The Court: Just a moment, and we will have it marked.

Mr. Lincoln: Pardon, sir.

The Clerk: 4 in evidence.

The Court: Please read the question to the witness, Mr. Reporter.

(Question and answer read by the reporter.)

Q. (By Mr. Lincoln): Showing you this picture, Mr. Mateas, can you tell me the names of those different persons, beginning with the guide? Is the guide the one in the extreme front there?

A. The guide is the one on the lower part of the picture.

(Testimony of Elmer H. Mateas.)

Q. That would be the front of the picture?

A. Yes, sir.

Q. Who is the one at the very end there, the last in the string? A. I am the one on the end.

Q. And then immediately below you is another man's face. Do you know who that is?

A. Yes, sir; Mr. Boles.

Mr. Lincoln: B-o-l-e-s, Mr. Reporter.

Q. And below Mr. Boles is a lady. Do you know who she was? A. That is Mrs. Vogel.

Q. V-o-g-e-l. And below her, again, is another lady. A. That is my wife, my wife.

Q. That is Mrs. Mateas? A. Mrs. Mateas.

Q. Below Mrs. Mateas, again, is another lady.

A. Mrs. Rayle—no; that is Mrs. Boles.

Q. Mrs. Boles. And then the last lady was named who? A. Mrs. Rayles or Rayle.

Q. Rayle, R-a-y-l-e? A. I believe so.

Mr. Lincoln: I observe, your Honor, that it is 12:00. Does the court care to suspend at this time?

The Court: Yes; we will take the noon recess at this time. You may step down, Mr. Mateas.

Is there any objection to resuming at 1:30?

We will recess at this time until 1:30 this afternoon.

(The court admonished the jury.) [84]

You are now excused until 1:30 this afternoon.

(The jury retire from the courtroom.)

The Court: Is it stipulated, gentlemen, that the jury has left the room?

Mr. Schell: Yes; so stipulated.

Mr. Lincoln: Yes, your Honor.

The Court: Mr. Lincoln, you were asking two questions to which I sustained the objection. You asked if there was any difference in the manner in which they were holding their reins. I sustained an objection upon the form, because some person might be holding the reins up like this, and somebody like this, and someone over here like that.

Mr. Lincoln: I see your Honor's point.

The Court: If you have a question to bring out, something that should have been obvious to anyone present, that is, that some people were holding their reins and some were not——

Mr. Lincoln: Yes, sir.

The Court: ——as I understood in your opening statement that you intended to prove, that would be a different matter.

Mr. Lincoln: Thank you for the thought, your Honor.

(Further discussion of court and counsel as to the order of proof omitted from transcript.)

The Court: The case is recessed until 1:30 [85]

(Whereupon, a recess was taken until 1:30 o'clock p.m. of the same day, Tuesday, September 30, 1947.) [86]

Los Angeles, California,

Tuesday, September 30, 1947, 1:30 P.M.

ELMER H. MATEAS

recalled.

Direct Examination
(Resumed)

The Court: Is it stipulated, gentlemen, that the jurors are all in their places?

Mr. Lincoln: Yes, sir.

Mr. Schell: So stipulated.

The Court: Proceed.

Mr. Lincoln: I understand, your Honor, that I would not be precluded from asking questions with reference to the position of the reins, provided, however, my questions are properly framed, sir.

The Court: Put your questions, Mr. Lincoln. Put your question, Mr. Lincoln.

Mr. Lincoln: Thank you.

Q. Mr. Mateas, as your party was just about to start where were your reins with reference to the mule?

A. They were lying idle on the mule's neck with a loop around the horn.

Q. Did you observe where the reins were with relation to the mules of any other members of the party?

Mr. Schell: That is objected to as incompetent, irrelevant and immaterial. [87]

The Court: Overruled.

(Testimony of Elmer H. Mateas.)

A. May I answer that? Not to all of them, but there were some ones were in the same way; they were lying loose and may or may not have been tied to the horn.

Q. (By Mr. Lincoln): At that time did you have any talk with the trail master with reference to that position of your reins?

A. He came over and told me to hold the reins in my hands at all times.

Q. And did you do that? A. Yes, sir.

Q. Just as you were about to start out of the corral where was the mule that your wife was on with reference to you?

A. She was in the same position it shows in the picture, of roughly half way, a little toward the front.

Q. And did you have any talk with the trail master then with reference to your position in the string?

A. Yes, sir. I wanted to bring my mule in line behind my wife and he pulled me back out of line; and I requested him not to ride there, because I wished to be alongside or behind my wife or close to her, and I am not sure what he said, but he would not let me do it. He pulled me back out of the string.

Q. As you went along down the trail what, if anything, [88] did your mule do rather than walk along behind the rest of them?

(Testimony of Elmer H. Mateas.)

A. Well, at frequent intervals he would break into a faster trot or whatever the particular speed was, and try to squeeze through the preceding mules.

Q. Was that on the side of the mountain or on the side where the abyss was?

A. Well, he did it several times on the way down and it would be sometimes on one side and sometimes on the other.

Q. Do you remember who was ahead of you on the immediate mule?

A. Mr. Boles was ahead of me.

Q. As your mule would act in that way from time to time did Mr. Boles do anything?

A. He was always wanting to grab my mule by, I believe it is called the halter or a head strap on the mule. He would grab the mule and hold it back.

Q. How many times would you say, roughly—perhaps you can't give the exact number—but about how many times would you estimate that the mule acted in this manner before you arrived at Indian Gardens?

A. Oh, I would say it was six, maybe eight.

Q. When you arrived at Indian Gardens did all the people dismount? [89]

A. At Indian Gardens, yes, sir; everybody dismounted.

Q. And about how long a rest did you have before they began to mount again?

A. I would say about an hour.

Q. During that time you had lunch, did you?

A. Yes, sir.

(Testimony of Elmer H. Mateas.)

Q. Did you notice whether the mules had anything to eat or to drink?

A. No, sir; not at that time. They didn't eat at all and they didn't drink until they left again.

Q. Just as they were about to leave they drank, was that it?

A. After they were mounted, they stopped in at the water trough before they went on down the trail.

Q. As the people began to mount, just before they started out again from Indian Gardens, was anybody else on your mule?

A. Mr. Boles was on my mule.

Q. And did you observe what the guide Bob Ennis was doing at that time?

A. He was starting from the front of the line, and the ladies were all in front, and he was going down to each mule, helping the ladies to mount.

Q. What mule, if any, did you get on?

A. Mr. Boles was on my mule. I took the next mule [90] in line, the only empty mule left. It turned out to be his.

Q. That was Mr. Boles' mule?

A. Mr. Boles' mule.

Q. Did you have to make some change in the stirrups?

A. Yes, sir. Mr. Boles is rather tall. The stirrups was too long for me.

Q. And at about that time did Bob Ennis come up there?

A. Yes; he came along, checking the mules, and told me I was on the wrong mule.

(Testimony of Elmer H. Mateas.)

Q. Did either you or Mr. Boles say anything to him at the time?

A. Yes, sir. Mr. Boles and I spoke about it on the way down. We had some slight conversation to the effect that I was a green rider——

Mr. Schell: Just a moment.

A. ——and he was an experienced rider.

Mr. Schell: I move to strike out any conversation between this witness and Mr. Boles, without the presence of this defendant and hearsay.

Mr. Lincoln: That was on the way down, I understand.

The Court: Is it your purpose to show the truth of what was said or merely the oral fact?

Mr. Lincoln: Only as to the fact, sir. As to the truth of it, I imagine that is a matter for the jury to determine as a finality. [91]

The Court: I will receive this conversation between the two riders for the sole purpose of showing what in fact was said, not to show the truth of what was said. In other words, what these riders may have said, ladies and gentlemen, you understand would not be binding upon the defendant unless the defendant was there. So what was said will be admitted only for the purpose of showing the facts of what was said, but not the truth of what was said.

Q. (By Mr. Lincoln): Now, Mr. Mateas, will you give us, please, the conversation which you had with Mr. Boles on the way down before you got to Indian Gardens?

(Testimony of Elmer H. Mateas.)

Mr. Schell: May I have the same objection, your Honor, that it is incompetent, irrelevant and immaterial, hearsay, not within the issues, and would be purely hearsay, not part of the *res gestae*.

The Court: Is that the same question you are just repeating?

Mr. Lincoln: That is the same question; yes, sir.

Mr. Schell: To keep the record straight, he has re-asked the question and I have to repeat my objection.

The Court: Yes; I understand. Your objection will be overruled, and the evidence received for the limited purpose stated, namely, to show it was in fact said, and not the truth of what was said.

You may relate the conversation. [92]

The Witness: Shall I proceed?

The Court: Yes.

A. The conversation was not all at one particular time. There would be a few words every time he stopped my mule. And just the words there was, he asked if I was an experienced rider, which I was not.

The Court: No. What did you say and what did he say?

The Witness: I beg pardon?

The Court: What did you say and what did he say?

The Witness: Well, I don't remember the exact words.

The Court: Well, the substance of it.

(Testimony of Elmer H. Mateas.)

The Witness: Well, he asked me if I had ever ridden before. I told him no; I had ridden burros when I was a child and nothing since then. I asked him if he was an experienced rider. He said he was practically born on a mule; he had been on them since he was two years old, had been in pack trains, most everything.

This was not at one particular time. It was a little bit at particular different intervals. He offered to trade mules with me. I told him I would like to get off the mule I had but I wouldn't expect him to change with my mule. He assured me he could handle most anything. That was on the way down to Indian Gardens.

Q. (By Mr. Lincoln): Now, coming down to Indian Gardens and the time that Bob Ennis, the guide, came up to [93] talk with you about your change of stirrups, was there any conversation then or any talk between Bob Ennis and Mr. Boles and you with reference to your change of mules?

A. Yes, sir; there was more or less a three-way conversation.

Q. And will you tell us——

A. Bob Ennis told me I was on the wrong mule. I told him I realized that. Mr. Boles offered to trade with me because I couldn't handle my mule. And Bob said I had to keep the mule I started with. Mr. Boles told him that I had a skittish mule and that his mule was a perfectly safe mule, and he preferred to trade over. And Ennis insisted we couldn't do it.

(Testimony of Elmer H. Mateas.)

We had a few words back and forth to the effect that it was quite all right with Mr. Boles that we had traded mules, and still it was not satisfactory to Bob Ennis; that we had to remain on the mules we started with.

Q. Then you changed back, did you, to your original mules? A. Yes, sir; we did.

Q. And Mr. Boles went on his No. 6 mule, whatever that was? A. Yes, sir.

Q. And to the same place in the string where he had been going on the way down? [94]

A. Yes, sir.

Q. From the time that you started from Indian Gardens were you going steadily down hill?

A. Well, it was down hill all the way.

Q. And did something happen between you and this mule Chiggers as you got some little distance down?

The Witness: I didn't get that question.

The Court: Please read it, Mr. Reporter.

(Question read by the reporter.)

A. Yes, sir.

Q. About how far had you gone, could you say in miles or in time?

A. In miles I could not say. In time, I would say it was between a half hour and an hour.

Q. Tell us, please, just what happened as you remember it.

A. Well, the mules were kind of stringing out, becoming farther apart and the line was getting

(Testimony of Elmer H. Mateas.)

longer, and the guide stopped his mule to allow the other mules to catch up. So they all did, and Mr. Boles' mule stopped at kind of an irrigation ditch or something, apparently decided to get a drink of water. Mr. Boles kicked him in the ribs. He started up fast to keep up with the string. My mule started up fast right behind him. When Mr. Boles' mule reached the end of the line where he [95] should be, he stopped, my mule with him, where he left off running and started bucking, practically sort of one operation, one followed into the other. He continued bucking until I was thrown off.

Q. Well, what did your mule finally do?

A. He finally threw me off.

Q. Which end? I mean which end of the mule?

A. Over the mule's head.

Q. What? A. Over the mule's head.

Q. Over the mule's head. Well, which end of you did you light on?

A. I landed right on the base of my spine a little bit toward the right.

Q. On the ground, I suppose? A. Yes, sir.

* * * * *

Cross-Examination

By Mr. Schell:

Q. Mr. Mateas, you had ridden when you were a young man, had you not?

A. Never horses or mules.

Q. Had you ridden at all?

A. I have ridden burros when I was a young man. I was a child. I think I was about six years old.

(Testimony of Elmer H. Mateas.)

Q. You had ridden quite a bit hadn't you?

A. Not quite a bit; no, sir; just occasionally.

Q. You were in the Grand Canyon area in 1941?

A. Yes, sir.

Q. How long did you stay there at the time?

A. I believe we just stayed overnight that time.

Q. Was that when you decided that you wanted to go down the Canyon sometime?

A. We wanted to make the trail at that time, but reservations were harder to get. We would have a day or two wait and we didn't want to stay that long; so we figured we would come back some other time, and we continued on our original route.

Q. In other words, when you were there in [105] 1941 you would have gone down if you had been able to make the reservations?

A. Yes, sir.

Q. So, then in 1942 you went back for one of the express purposes of taking this trip down into the Canyon, is that right?

A. Yes, sir.

Q. When you saw these people, some of them, with the reins in their hands and some of them hanging on the saddle horn, that was in the corral, was it not?

A. Up on top of the rim. I was not quite sure of the question. You say when some people were or were not holding their reins. Yes, sir.

Q. That is, you noticed it in the corral on top?

A. Yes, sir.

Q. Before you had started your trip?

A. Yes, sir.

(Testimony of Elmer H. Mateas.)

Q. During the trip down and up to the time that you went off the mule, the mule had never bucked during that time, had it?

A. It did not buck on the way down; no, sir.

Q. And the only thing that the mule would do would be pull up along the mule ahead of him and go faster than that mule, is that hight?

A. Well, there was more than pulling up [106] alongside ahead. He was trying to squeeze through.

Q. As a matter of fact that entire trip is conducted in a walk, isn't it?

A. I did not get that question.

Q. The entire trip is conducted on a walk, is it not?

A. I don't follow that. The entire trip is on what?

Q. The mules do not trot; they walk all the way?

Q. Yes, sir.

Q. As a matter of fact up until the time just prior to this accident the mule never trotted at all, did he?

A. Are you speaking of my mule or the mules, all of them?

Q. No; your mule.

A. All the mules, they walked most of the time. I believe they walked all the time, other than my mule.

Q. As a matter of fact your mule walked all the time; it never broke into a trot until just before you went off the mule; isn't that right?

(Testimony of Elmer H. Mateas.)

A. No. He broke into a trot or a speed faster than a walk, overtook the man in front and tried to squeeze through.

Q. Did you keep the mule fairly close up to the mule ahead of you at all times?

A. Well, they would vary a little. When they hit a [107] sharp turn the mule would stop until the previous mule could negotiate the turn, and it died down and he would follow, sometimes would be fairly close, sometimes there might be six or eight feet or ten.

Q. When that turn was negotiated your mule would catch up with the other mule; isn't that right?

A. They were stringing back and forth all the time. Sometimes the whole string would be along, sometimes they would be all crowded more or less close to each other.

Q. Mr. Mateas, you remember your deposition being taken? A. In your office?

Q. Yes. A. Yes, sir.

Q. Mr. Lincoln was there? A. Yes, sir.

Q. Represented you, and you were sworn as a witness. You were sworn by the reporter and you were asked certain questions?

A. I don't follow that.

Q. I mean the oath was administered to you before you testified, was it not?

Mr. Lincoln: Oh, we stipulated it was.

A. I still don't follow you there. The last I got was in your office, you and Mr. Lincoln and myself

(Testimony of Elmer H. Mateas.)

and my [108] wife, and a man recording it. I didn't follow you after that.

Mr. Schell: You stipulate that he was sworn?

Mr. Lincoln: Certainly, certainly.

Q. (By Mr. Schell): Then, afterwards, you read your deposition over and signed it, did you not?

A. Yes, sir; that is, I don't believe I read it at that time but it was agreed that it would be signed there, anyway.

Q. And you later did read it over and signed it?

A. I don't believe I read at the time; no, sir.

The Court: Later, you did? You later read it over and signed it? Later on, you read it over and signed it?

The Witness: I read it over later; yes, sir.

Q. (By Mr. Schell): And signed it?

A. It was already signed.

Q. What?

A. I believe it was already signed. But at any rate, I know what was in it at the time I read it; Yes, sir.

Mr. Schell: I don't know whether your Honor has the original deposition there or whether I should use this copy. I would have to approach the witness. I only have the one copy.

The Court: Is the deposition in the file, Mr. Clerk? Is there any objection to making use of the copy? [109]

Mr. Lincoln: Not at all, sir.

(Testimony of Elmer H. Mateas.)

The Court: Very well; you may show the witness the copy.

Mr. Schell: May I approach the witness, because I only have the one?

The Court: You may.

Mr. Lincoln: He can read from there and you take mine. If you say it is there, we know it is.

Mr. Schell: I will take this one because that is marked, and let him see that one.

Mr. Lincoln: That is quite all right.

Q. (By Mr. Schell): Calling your attention to page 6, Mr. Mateas—— A. Yes, sir.

Q. Beginning on line 10 down to line 20, will you read that to yourself first?

A. From line 10 to line 20?

Q. Yes; to and including line 20. Is that correct? A. Yes, sir.

Q. I will read that portion of it.

“Q. In other words, he didn’t buck but he just tried to pass the mule ahead of him?

“A. No; he just tried to get ready to run, but he didn’t buck at any time until the actual occurrence.

“Q. Would he trot? [110] A. What?

“Q. Would he trot when he would try to get ahead, or just walk fast?

“A. Oh, the mules were pretty close behind one another, and he would just try to squeeze in and get through. There wasn’t room for him to start trotting.”

(Testimony of Elmer H. Mateas.)

Mr. Lincoln: We object to that quotation, your Honor, as entirely immaterial and not in any manner impeaching what the witness has already testified to.

The Court: Did you so testify?

The Witness: Sir?

The Court: Did you so testify?

The Witness: Yes, sir; and I still agree with that.

The Court: Very well.

The Witness: But the mule, if he was merely walking, he would have no method of catching up with the mule in front.

The Court: The objection is overruled.

The Witness: He was unable to——

The Court: Just a moment. Do not volunteer anything.

The Witness: I was just explaining it.

Mr. Lincoln: Whatever the gentleman just said to your Honor may be stricken out, I trust?

The Court: Very well.

Mr. Schell: Just one moment, your Honor. [111]

Q. Will you look on page 7, Mr. Mateas, beginning with line 18? A. 18?

Q. Yes; down to page 8, line 19, and read that to yourself. A. Page 8?

Q. Starting on page 7, down on line 18, down to line 19 on page 8. A. Down to what line?

Q. 19. A. 19. Yes, sir.

Q. Have you read that? A. Yes, sir.

(Testimony of Elmer H. Mateas.)

Q. Did you so testify? A. Yes, sir.

“Q. Did you say anything to the guide at Indian Gardens about the mule?

“A. Well not directly, but he knew we wanted to change mules. The man riding in front of me said he was an experienced rider, riding mules, and he offered to trade mules with me and——

“Q. Who was that? A. Pardon?

“Q. Who said that?

“A. Whoever the man riding in front [112] of me next to the last one in line. He said he was an experienced mule rider and he offered to trade mules with me.

“Q. Who did he say that to?

“A. Pardon?

“Q. Who did he say that to?

“A. To me.

“Q. To you?

“A. Yes. We traded mules. I didn't know the difference in the mules until we got on them. The stirrups on my mule, naturally, were a lot shorter than his, and we got to regulating the stirrups, and the guide, checking up, saw the wrong mule and he made us get off and go back to our mules. I was put back again on the mule that I had originally.

“Q. But nothing was said to the guide about why——

“A. No, I don't believe so.

“Q. ——you wanted to change mules?

“A. I don't think we did, no.”

(Testimony of Elmer H. Mateas.)

The Witness: If you would continue that, it explains itself.

Q. (By Mr. Schell): Now, Mr. Mateas——

The Court: Just a moment. The witness wants to make an explanation.

Mr. Schell: I beg your pardon. [113]

The Court: What portion do you want to read?

The Witness: The same as he previously had me read was true as far as he got, but he stopped reading too soon.

The Court: You read any of the rest of it you wish to read.

The Witness: Sir?

The Court: You read any of the rest of it that you wish to read.

The Witness: Just one of the previous ones, the previous one about the mule walking; that he didn't trot. He stopped at about line 19, I think. He asked if the mule would trot when he tried to get ahead or just walked fast. I replied that "mules were pretty close behind one another, and he would just try to squeeze in and get through. There wasn't room for him to start trotting. There wasn't room for him to really try to trot or run, because the mules were too close to one another. He just tried to squeeze through.

"Q. Walking?

"A. It was more than a walk. He was in a hurry, in other words.

"Q. A fast walk, or was it a trot or what was it?

(Testimony of Elmer H. Mateas.)

“A. Well, he would try to break into a trot.

“Q. Did he get into a trot?”

I did not hear the question and he repeated it:
“Did he actually trot? [114]

“Well, on some of the occasions he probably was able to and some he probably wasn’t. It depends on how much the mules were spread out back and forth.”

The Court: Is that part of the testimony you gave in your deposition?

The Witness: Yes, sir. And then the one he just had now. I think he stopped on line 19. He said that he didn’t think I had told him why I wanted to change mules. Continuing on line 20:

“Q. In other words, you had no conversation with the guide at any time about the mule until after the accident?

“A. No; I wouldn’t say that. I think I objected to the mule being a little bit too frisky. At the time we discovered we were on the wrong mule we told him that we would like to change mules, that I preferred a slower mule, and this other fellow said he could handle any kind of mule, but he said he wasn’t allowed to do that, or words to that effect, that we had to stay on the mules he gave to us at the top”

I think that is about as far as that pertains to it.

The Court: Is that part of your testimony?

The Witness: Yes, sir.

(Testimony of Elmer H. Mateas.)

The Court: At the time of your deposition?

The Witness: Yes, sir. [115]

Q. (By Mr. Schell): Now, Mr. Mateas are you positive that you did mention anything to the guide about the mule now?

A. I was not positive of the exact words, but I am positive that he was informed.

Q. Positive that you had some conversation with him about it? A. Yes, sir.

Q. Turning to page 26, lines 14 to 18—26, lines 14 to 18. A. From what line?

Q. 14 to 18 on page 26. You testified?

A. Page 26, line 14?

Q. 14 to 18; yes. A. 14 to 18.

Q. “Q. Did you say anything to Bob as to why you were on the other mule?

“A. I may have mentioned I was afraid I couldn’t handle the mule. He was kind of frisky, and I wasn’t an experienced rider.”

You had some doubt, did you not, at that time as to whether you did or did not mention it to him?

A. No, sir. The same way, again, if you continue on the page it explains the question.

Q. Did you have any doubt, Mr. Mateas, at [116] that time?

A. My only doubt was as to the exact words. I never pretended to remember the exact words.

Q. In other words, you remember saying something but you do not remember the exact words?

A. I don’t remember the exact words; no, sir.

(Testimony of Elmer H. Mateas.)

Q. Mr. Mateas, were you interviewed in the hospital by someone shortly after the accident, two or three weeks after the accident?

A. I don't remember how long after the accident somebody came to the hospital.

Q. You were asked certain questions as to what occurred, were you not? A. Sure.

Q. You were asked certain questions as to what occurred?

A. Yes, sir; he asked a lot of questions.

Q. And then a statement was written up, was it not? A. Yes, sir.

Q. And you read it over? A. No, sir.

Q. Did you sign it?

A. He read it back.

Q. Did you sign it? A. Yes, sir.

Q. Was that statement true? [117]

A. As far as I recall and read back it is true; yes.

Mr. Lincoln: May I have that answer, if your Honor please?

The Court: Please read it, Mr. Reporter.

(Answer read by the reporter.)

Mr. Lincoln: Thank you.

Mr. Schell: May I approach the witness?

Q. I ask you, Mr. Mateas, if that is your signature? A. Yes, sir.

Q. On the first page? A. Yes, sir.

Mr. Lincoln: Stipulated it is his signature on every page, if that is what you desire to prove.

(Testimony of Elmer H. Mateas.)

Mr. Schell: You stipulate it is on every page, is that it?

The Witness: Yes, sir.

Q. Calling your attention to this portion of the statement, starting with here, that would be on the third page of the statement, the second sentence, starting on that down to the word "guide" on the second to the last line. You have read that, have you? A. I read it; yes, sir.

The Court: You may read the entire document if you desire, if you are asked any questions concerning it.

Mr. Schell: Yes, sir. If you wish to read it all, you [118] may do so. The judge is speaking.

The Court: I say, if you wish to read it all, you may do so before you are asked any questions concerning it.

Q. (By Mr. Schell): This statement was read to you before you signed it, was it not?

A. Yes, sir.

Q. And the facts stated therein are true?

A. The two parts in which I don't recall, one is that section there I don't recall, "There was no conversation." It is true that I got on the wrong mule. I didn't purposely change mules. That was Mr. Boles' part. And the other part was, he questioned me closely about any bees or wasps flying around the Canyon, and that part is not down there.

Q. I mean the facts set forth therein are correct?

A. They are what?

Q. I say, these facts are the facts in the statement you signed?

(Testimony of Elmer H. Mateas.)

A. Most of them, but on the mule there, he states that I did not inform Bob. I know that I did.

Mr. Schell: We offer the statement into evidence, if the court please.

Mr. Lincoln: We certainly will object to it, your Honor, upon the statement the witness just made, namely, that certain portions of it are not correct. Your Honor will [119] remember that the witness has stated that the document was not read by him before he signed it, but it was read over to him before he signed it.

The Court: You object that no foundation has been laid?

Mr. Lincoln: Yes, sir.

The Court: Sustained.

Q. (By Mr. Schell): The portion on page 2, or page 3, that I particularly called your attention to, you read that over, did you not?

A. Yes. I would say what is on page 2 I read all of it.

Mr. Lincoln: Wait a moment. We respectfully object, your Honor, to any interrogation with relation to this instrument, on the ground that your Honor has already ruled no proper foundation.

The Court: Overruled. He may attempt to lay a further foundation.

Q. (By Mr. Schell): You read that portion over that I particularly called your attention to first?

A. Well, I read the whole thing. I am not sure what is on page 2.

Mr. Lincoln: Page 3?

(Testimony of Elmer H. Mateas.)

The Court: You mean he read it today?

Mr. Schell: Yes; just now. I called his attention, if your Honor remembers, to one part of it first.

The Witness: Which part? Down to this point it is all true.

The Court: The witness is referring to what page, what page number and what document?

Mr. Schell: It is page 3, beginning with line 3, down to where did you say? You will have to point that out again. Down to where did you point?

The Witness: Down to about this point here (indicating in document).

The Court: He says that portion he did say?

Mr. Schell: Yes, sir.

The Court: Is that your testimony? Did you tell the man who wrote that what is on page 3 down to that point?

The Witness: He asked a lot of questions.

The Court: Did you make that statement?

The Witness: Most of the statement is correct, except the one point I disagree with, and there was one point we went into that is not down at all. Otherwise there is just a lot of questions he wrote in the first person as though I wrote them myself.

The Court: You may read it.

The Witness: And he made me sign every page.

The Court: You may have the witness read, if you desire, the portion he said he did state. [121]

Mr. Schell: All right.

Q. Will you read that portion that you say you

(Testimony of Elmer H. Mateas.)

That is what your Honor meant, isn't it?

The Court: Yes.

The Witness: Where do you want to start, "The man ahead of me was an experienced rider?"

Mr. Schell: Yes.

A. (Reading): "The man ahead of me was an experienced rider. He and I changed mules. I did not do this on purpose, but mounted the wrong mule. I was on the mule that the man ahead of me had been riding. However, the guide noticed the change and asked us to change to the mules that we had started out with. The rider of the other mule suggested that I stay on his mule after we had made the change, because of his experience in riding. However, the guide noticed that the stirrups were to long and then asked us to change mules."

Q. Isn't it a fact, Mr. Mateas, that you did not say anything to the guide that you wanted to change mules?

A. The fact that I didn't say anything, no, sir; it is not a fact. I did say.

Q. Isn't it a fact that you did not say anything and that you did not hear Mr. Boles, the other man, say anything to the guide? [122]

A. I did not get that.

Q. Isn't it a fact that you did not say anything to the guide that you wanted to change mules, nor did you hear Mr. Boles say anything to the guides to that effect?

A. It was a three-way conversation.

Mr. Schell: Just answer that yes or no, please, and then you can explain. Will you read it, please?

(Testimony of Elmer H. Mateas.)

The Court: Please read it, Mr. Reporter.

(Question read by the reporter.)

The Court: I think if you will divide it in two, you will get along faster.

Mr. Schell: I will reframe it. It is compound.

Q. Isn't it a fact that you did not say anything to the guide that you would like to ride this other mule? A. That is not a fact; no.

Q. And isn't it a fact that you did not hear Mr. Boles, or the other gentleman, say anything to the guide about changing mules?

A. That is not a fact, either.

Mr. Schell: If the court please, I would like, then, to offer into evidence the signed portion of this statement for the purpose of impeachment.

The Court: It has been read, the portion you have identified so far.

Mr. Schell: The entire statement is signed at the [123] bottom of each page, your Honor.

The Court: Well, he did not write it and he did not read it before he signed it. It was written by someone else and read back to him.

Was it read back to you in its entirety?

The Witness: What is that?

The Court: Was all of it read back to you at the time?

The Witness: As far as I recall, and I don't recall that particular paragraph there, and there was one more part we went into very carefully that is not down at all.

(Testimony of Elmer H. Mateas.)

Q. (By Mr. Schell): In other words, you discussed something during the conversation that was not put into this statement, is that right?

A. Well, there was a lot of discussion or conversation back and forth about the Canyon, the trip, and a lot of personal conversation involved between the adjuster and my wife and me.

The Court: But what he did put down there, what is on that statement, did you say to him?

The Witness: I agree on everything except that one part there. I don't agree on that.

The Court: Which part is that?

The Witness: The part he states in there that I did not say anything to the guide.

The Court: You did not say that to him? [124]

The Witness: That is what it says in there, but not true.

The Court: I will receive the document.

Mr. Lincoln: May it be received, your Honor, with the understanding that there is that particular clause in it which should not be in it?

The Court: It will be received as part of the evidence in the case.

The Clerk: This will be marked Defendant's Exhibit H.

The Court: Defendant's Exhibit H in evidence.

Q. (By Mr. Schell): About how long did you ride after you left—

Possibly we should read that to the jury now while it is in evidence, or defer that until later?

The Court: If you desire.

Mr. Schell: Possibly we should read it to them now, I think.

(Testimony of Elmer H. Mateas.)

“Grand Canyon, Ariz.

“July 6, 1942

“Report of Elmer Mateas:—

“My name is Elmer Mateas, age 29, married, residing at 433 Washington Ave., El Monte, California. We have lived there for the past 6 months. We formerly lived at 1743 Waco, Baldwin Park, California, we lived there for about 5 years. I am a plaster [125] contractor, and work for myself. I am not a member of any union. On June 17, 1942, Mrs. Mateas and I decided to take a mule trip down the Bright Angel Trail. We left the top of the Canyon about 11:30 a.m. We were going to take the overnight trip and stay at the Phantom Ranch. We arrived at the corral about 11:00 a.m. We did not choose our own mules, but the trail-master picked out the mule for each member of the party. We were not asked any questions concerning our riding ability. When the party”——

And then there is a signature “Elmer H. Mateas” at the bottom.

“started down the trail. I was the last member of the party. When we had just gone a short ways from the head of the trail my mule acted up with me. By this I mean that he did not like to be the last mule. He would try to pass the mule ahead of me. The mule tried to do this about six or seven times, at one time

(Testimony of Elmer H. Mateas.)

the man ahead of me grabbed the reins of my mule and held him back. Another time the mule got so close to the one ahead of him, that the other mules tail became entangled in the halter and reins of my mule. On the way to Indian Gardens most of this took place. Then we stopped at Indian [126] Gardens and had lunch. Before we got to the Gardens, the man ahead of me reached over and picked a rock from the wall of the Canyon, this dislodged some small rocks and dirt, and the noise caused my mule to bolt again. I have had some experience”
(Signature) “Elmer H. Mateas.”

“in riding, but not since I was a small boy. It has been about 20 years since I rode. The man ahead of me was an experienced rider, and when we left Indian Gardens to continue on down the trail he and I changed mules. I did not do this on purpose, but mounted the wrong mule. I was on the mule that the man ahead of me had been riding. However, the guide noticed the change and asked us to change to the mules that we had started out with. The rider of the other mule suggested that I stay on his mule after we had made the change, because of his experience in riding. However, the guide noticed that the stirrups were too long and then asked us to change mules. I did not say anything to the guide that I would like to ride this mule, and I do not know if the other man said

(Testimony of Elmer H. Mateas.)

anything to the guide. After the party was lined out, we started down the trail again. When we were about $\frac{1}{2}$ mile from the river, my mule bucked me off. Shortly before this the party straggled out on the trail and from the mule ahead of me to the rest of the party was about $\frac{1}{2}$ block. I was about''

I can't read this one word.

"I was about 10 feet from the mule ahead of me. Then it appeared as if everyone was trying to make their mules catch up with the rest of the party. The man in front of me kicked his mule, to urge it on to catch up, and just as the mule in front of me started running, mine did, too. I could not hold him back, and, as he approached the party he tried to pass them again. The party was on the trail, and was not stopped. I do not know how close I was to the rest of the party, nor do I know when my mule stopped running or started bucking. I remember that the mule bucked several times before I was thrown off. I went off the head of the mule, and struck the ground, with my back. It seemed as if the right side of my back struck the gravel, in the area between my spine and my hip. The pain was immediate and was intense. I also realized that my legs from the hips down were paralyzed. I thought that my back was broken. The guide came back immediately and asked me what was wrong and I told him that I thought my hip or [128] back was broken.

(Testimony of Elmer H. Mateas.)

They made me as comfortable as was possible, then I stayed there until the doctor came. The doctor examined me, then gave me a shot, and brought me out of the canyon on a mule stretcher. I was taken to the hospital at the Canyon, and have been under the doctor's care ever since. The pain was very severe at first, and bothered me whenever any movement was necessary. About one week ago the doctor strapped me up and I could move with some degree of comfort. However, I still have pain when I move. I have been able to walk some in the last two days. The doctor has taken X-rays of my back and he has determined that there are no broken bones. I do not know just what is wrong with my back. I never had a back injury before, and have never been injured on my right side before. When I get back home I will go to see Dr. Sloan. He is my doctor. His office is located on Manchester Blvd. in Ingelwood, California. I have a health and accident policy with the Mutual Benefit of Omaha, Nebraska."

(Signed) "ELMER H. MATEAS." [129]

The Court: We will take the afternoon recess at this time.

(The court admonished the jury.)

The Court: You are now excused for a five-minute recess.

You may step down.

(Short recess.)

(Testimony of Elmer H. Mateas.)

The Court: Is it stipulated, gentlemen, that the jurors are all in their places?

Mr. Lincoln: Yes, sir.

Mr. Schell: So stipulated.

The Court: Proceed.

Q. (By Mr. Schell): About how long had you ridden from the time you left the Indian Gardens until this accident happened?

A. Between a half an hour and an hour.

Q. And at the place where the accident occurred was the trail more or less level?

A. I didn't get the question.

Q. At the place where the accident occurred was the trail more or less level?

A. It was much more level than it had been.

Q. In other words, you were not very far from the river bottom there, were you?

A. I don't know personally, but I understand it is about [130] a half a mile.

Q. From the time you left the Indian Gardens up until the time the accident happened you had no trouble whatsoever with the mule, did you?

A. Not that I recall; no, sir.

Q. When did you leave the Grand Canyon to come back to Los Angeles?

A. It was three weeks to the day, July 3rd, I believe, or July 5th.

Q. There has been introduced in evidence a picture of a party and you in the party on the mule. You were the last one in that group shown in the picture. That was taken about a half a mile from the start, was it not?

(Testimony of Elmer H. Mateas.)

A. It is hard to say, but very close to the top.

Q. And the party stopped there and had their pictures taken? A. Yes, sir.

Q. And there the cinches were checked and the equipment and the saddles?

A. I believe that is where they checked them.

Q. Can you tell us about how long the trip was in actual travel time from the time you left the corral until you got to Indian Gardens?

A. It was about three hours to Indian Gardens, approximately. [131]

Q. Did you stop at all on the way outside of that place where you had your picture taken?

A. From the top to Indian Gardens up to that point, no.

Q. Then it was something like a half an hour to an hour from there on to the point of the accident, is that right? A. Yes, sir.

Q. At the time that the accident happened was the first time the mule had bucked during the entire trip; is that not right?

A. The first time what?

Q. The mule had bucked? A. Yes, sir.

Mr. Schell: That is all.

Mr. Lincoln: May I see that exhibit, Mr. Clerk, that last one that was introduced, the yellow sheets?

(Testimony of Elmer H. Mateas.)

Redirect Examination

By Mr. Lincoln:

Q. Mr. Mateas, these yellow sheets which have been shown to you, which have been introduced as Exhibit H, are not in your handwriting, are they, except where your signature appears on each page.

A. No, sir. [132]

Q. I understand you to say that before you signed any one of those pages you did not read over this document, is that right?

Mr. Schell: Objected to as leading and suggestive.

A. I never read over, personally, the document.

The Court: Sustained.

Q. (By Mr. Lincoln): Did you read over this document before you attached your name to any one of the pages?

A. I did not read it; no, sir.

Q. Did the person, whoever it may be, read something to you before you signed it?

A. Yes, sir.

Q. Do you know whether or not this person read everything which was on these pages before you signed it?

A. Mr. Schell had me read it back. I recall he read probably everything except that one point and points that are not included.

Q. Did anybody ever give you a copy of that document? A. No, sir.

(Testimony of Elmer H. Mateas.)

Q. Did you ever read it yourself before today?

A. No, sir.

Q. Do you remember what time of day it was that this gentleman came in to see you in the hospital?

A. I believe in the afternoon. I don't recall correctly. [133]

The Court: Do you remember the date? Do you remember the date?

The Witness: No, I don't.

The Court: About when was it?

The Witness: I would say it was more than a week after I had been in the hospital, probably during the second week.

The Court: The second week you were in the hospital?

The Witness: Yes, sir.

The Court: After the accident?

The Witness: Yes, sir.

Q. (By Mr. Lincoln): Were you in bed at that time?

A. I believe I was starting to get up, which would make it about two weeks after the accident. I believe I started to get up. I was in bed when he came, but I was starting to be able to get up in a wheel chair.

Q. Were you in bed during the conversation that you had with this person? A. Yes, sir.

(Testimony of Elmer H. Mateas.)

Q. And during that time were you suffering any pain at all?

A. I was suffering pain all the——

Mr. Schell: That is objected to as leading and suggestive.

The Court: Overruled.

Mr. Lincoln: Now you may answer, please. [134]

A. The same question? Obviously, because I was suffering pain all the time I was in the hospital.

Mr. Lincoln: That is all.

Mr. Schell: No further questions.

The Court: Does any member of the jury have any questions?

You may step down, Mr. Mateas. You may step down. Call your next witness.

Mr. Lincoln: May I be permitted, your Honor, to call one witness out of turn? I have a lady here who is a working lady and who has just been excused from her employment temporarily.

Mr. Schell: I have no objection.

The Court: You may.

Mr. Lincoln: Thank you, sir. Mrs. Vogel, would you come forward, please?

MRS. ELLA W. VOGEL

called as a witness by plaintiff, being first sworn,
was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Mrs. Ella W. Vogel.

The Clerk: Mrs. Ella W. Vogel, V-o-g-e-l?

The Witness: Yes, sir. [135]

Direct Examination

By Mr. Lincoln:

Q. Where do you live, Mrs. Vogel?

A. 96 North Catalina, in Pasadena.

Q. Do you know Mr. Mateas who just testified?

A. Well, I met him first on this party.

Q. Are you related to him in any way?

A. No, sir.

Q. Do you know Mrs. Mateas, his wife?

A. Well, I met her at the same time.

Q. Was that the first time you had met them?

A. Yes, sir.

Q. Are you related to her in any way?

A. No.

Q. Do you have any interest whatsoever in the
outcome of this case? A. No.

Q. Do you remember an excursion—may that be
withdrawn? Did you about the 17th of June, 1942,
have occasion to go to the Grand Canyon in
Arizona? A. Yes, sir.

Q. On that day were you a party or a member
of a party which went on a mule ride down the Can-
yon to go to the Phantom Ranch?

A. Yes, sir. [136]

(Testimony of Mrs. Ella W. Vogel.)

Q. I show you a photograph, Exhibit 4, which has been introduced here and ask you whether or not you recognize any person in the photograph? Particularly, do you recognize yourself in that photograph? A. Yes.

Q. And which one, if at all, are you?

A. Well, I am the——

Q. Figuring from the top down, if you will, please?

A. The third one from the top.

Q. The third one from the top. That was just ahead of Mr. Boles, was it? A. Yes, sir.

Q. First came Mr. Mateas, then Mr. Boles and then yourself, is that right? A. Yes.

Q. Did you ever have occasion to ride a horse or mule before? A. Yes.

Q. On any excursion somewhat similar to this?

A. In the Sierra Navadas I went on a pack train.

Q. In the Sierra Nevadas? A. Yes.

Q. How long before this particular trip was that excursion?

A. I don't exactly remember; a couple of years, probably. [137]

Mr. Lincoln: Can the jurors all hear this lady, your Honor?

Q. On this particular trip, as you went down did you notice the actions of the mule ridden by Mr. Mateas? A. Yes; I did.

Q. Would you be good enough to describe them to the jury?

(Testimony of Mrs. Ella W. Vogel.)

A. Well, he acted as if he was getting ready to buck frequently.

Mr. Schell: Just a moment. We move to strike that as a conclusion of the witness.

The Court: Yes; that may be stricken. Try again, Mrs. Vogel, to describe it as best you can.

A. Well, I thought he was going to buck.

Mr. Schell: I move to strike that out as not responsive to the question and a conclusion of the witness.

The Court: Motion granted. How did he appear to you? Tell us what he was doing.

The Witness: I don't know how to describe it. I know that—well, I don't know how to describe it.

The Court: Do the best you can.

Q. (By Mr. Lincoln): Well, Mrs. Vogel, tell us what the mule did as you saw it.

A. In fact, I thought he bucked before we got down there, because it caused such a commotion every time, which [138] was at least a dozen times.

The Court: Is that the way it appeared to you?

The Witness: Yes.

Mr. Schell: I move to strike out the answer as not responsive to the question and a conclusion of the witness.

Mr. Lincoln: I submit, your Honor, that it is responsive to the question.

The Court: The motion is denied. She has used "thought" in the sense of how it appeared. Is that the way it appeared to you?

The Witness: Yes. I was worried because——

(Testimony of Mrs. Ella W. Vogel.)

The Court: No; you do not need to tell us that.

Mr. Schell: I move the answer go out.

Mr. Lincoln: It may go out.

The Court: Motion granted.

Q. (By Mr. Lincoln): Mrs. Vogel, the party arrived at Indian Gardens. Do you remember whether or not it stopped at any time?

A. I think it stopped several times.

Q. And we will say, perhaps, on one occasion did you have any talk with Mr. Bob Ennis, the guide?

A. Well, he came back to adjust my stirrup straps. I couldn't seem to get them just the right length.

Q. Did you have some talk with him at that time?

A. Well, I asked him if Mrs. Rayle's mule was all right.

Q. And which was Mrs. Rayle? [139]

A. Mrs. Rayle is the—she is next to the last in the party. She is right behind Bob.

The Court: Bob who?

The Witness: Ennis, the guide.

The Court: He was leading the party?

The Witness: Well, I mean she was second in the party.

The Court: She was next to the bottom of the photograph?

The Witness: Yes.

The Court: Is that Exhibit 4?

The Witness: Yes.

(Testimony of Mrs. Ella W. Vogel.)

Q. (By Mr. Lincoln): What else did you say to Mr. Ennis at that time, if anything?

A. Well, I don't know. We talked about the mule.

Q. Which mule?

A. Well, I was worried for fear Mrs. Rayle——

The Court: She was next to the bottom of the photograph?

The Witness: Yes.

The Court: Is that Exhibit 4?

The Witness: Yes.

Q. (By Mr. Lincoln): What else did you say to Mr. Ennis at that time, if anything?

A. Well, I don't know. We talked about the mule.

Q. Which mule?

A. Well, I was worried for fear Mrs. Rayle——

Mr. Schell: No. Just a moment. I move to strike the answer.

The Court: We are not interested in what was going on in your mind, Mrs. Vogel. We are interested in what was said and done.

A. Well, I asked him if Mrs. Rayle's mule was all right.

Q. (By Mr. Lincoln): What did he say?

A. He said, "Yes." And then I called to Mrs. Rayle and asked her. She made some remark about he was a [140] sloppy mule or something, just joked along.

Q. And this was when Bob was there?

A. Yes.

(Testimony of Mrs. Ella W. Vogel.)

Q. Now, was there any conversation about any other mule?

A. Well, I don't know that I said anything in particular. I know there was conversation.

Q. At this particular time?

A. At that time; yes.

Q. All right. As I understand it, again, now you were just immediately in front of Mr. Boles; that is right? A. Yes.

Q. During the ride down did you hear any conversation between Mr. Boles and Mr. Mateas?

A. Yes; lots of it.

Mr. Schell: Just a moment. That is objected to, if the court please, as incompetent, irrelevant and immaterial, and pure hearsay insofar as this defendant is concerned.

The Court: The question is merely directed to whether or not there was conversation. The objection is overruled. The answer may stand.

Q. (By Mr. Lincoln): Will you tell us, please, what was the substance of that or any other conversation which you may have heard? Just a moment, please.

The Court: The same objection? [141]

Mr. Schell: The same objection, your Honor.

The Court: Do you offer it for the purpose of proving the truth of what was said or the fact that something was said?

Mr. Lincoln: No, sir. I offer it for the same reason which I offered the testimony of Mr. Mateas

(Testimony of Mrs. Ella W. Vogel.)

in relation to the same matter, that is, that this was said. As to whether it was the truth or not is a matter, perhaps, for the jury to determine, your Honor.

The Court: For that purpose, the objection is overruled.

We receive evidence of this conversation, ladies and gentlemen of the jury, not for the purpose of proving the truth of what was said, but merely proving the fact as to what was said, oral facts, the words spoken, but not as to the truth of the words spoken.

Mr. Lincoln: And not necessarily, of course, your Honor, as to the untruth of it.

The Court: Yes. But the meaning that I want to instruct the jury about is that two people saying something does not prove it is true. It does prove that it was said, and those are part of the facts, part of the events that occurred, apparently, on this trip. So you are to consider this conversation only as a fact, words spoken, and not as evidence of truth of the words spoken. [142]

Mr. Schell: As to that, if the court please, it would not in any way be binding on these defendants, because it would be purely hearsay as to them.

The Court: It would be hearsay as to the truth of what was said, but would not be hearsay as to the fact that certain words were spoken. This witness, if she testifies to it, will testify that she heard it; so it cannot be hearsay as to her that certain words were spoken.

(Testimony of Mrs. Ella W. Vogel.)

Mr. Schell: As to that, if the court please, it would not in any way be binding on these defendants, because it would be purely hearsay as to them.

The Court: It would be hearsay as to the truth of what was said, but would not be hearsay as to the fact that certain words were spoken. This witness, if she testifies to it, will testify that she heard it; so it cannot be hearsay as to her that certain words were spoken.

Mr. Schell: No. But as to the defendant, though, however.

The Court: As to the defendant, so far as the truth of the words spoken is concerned, it is hearsay; and I am receiving the evidence, and I am sure the jury understands that they are to consider it, only for the purpose of knowing what was said and done, and not as to the truth of what was spoken.

You may proceed.

Q. (By Mr. Lincoln): Had you ever met Mr. Boles before this particular occasion?

A. No.

Q. Do you know what office, if any, he holds?

Mr. Schell: That is objected to as calling for a conclusion, if the court please.

Mr. Lincoln: Just a moment.

The Court: Sustained. It is assuming facts not in [143] evidence.

Q. (By Mr. Lincoln): About these conversations, was there more than one conversation between Mr. Mateas and Mr. Boles before you got to Indian Gardens? A. Yes.

(Testimony of Mrs. Ella W. Vogel.)

Q. Were they all on somewhat the same subject or were they all different?

A. Almost all the talk on the way to Indian Gardens was about that fractious mule.

Mr. Schell: Now, just a moment. May we have the question answered and no further comment volunteered?

Mr. Lincoln: Just confine your answer, Mrs. Vogel, please, to whether they were on the same subject or whether they were on different subjects.

Mr. Schell: If the court please—might it be stipulated, counsel, that my objection goes to this entire line of conversation?

The Court: Do you desire to strike this last answer?

Mr. Schell: Yes, if the court please.

The Court: The answer may be stricken.

Mr. Lincoln: We have no objection, if the court please. It should be.

The Court: Yes. Well, it is understood that your objection heretofore made goes to any part of the conversation that occurred outside of the presence of any representative of the defendant; and the jury is to understand that [144] any conversation that occurred outside of the presence of a representative of the defendant is admitted solely for the purpose of evidence of what was said, and not evidence as to the truth of what was said.

Q. (By Mr. Lincoln): Now, Mrs. Vogel, we come back to this question: Were these different conversations all on the same subject?

A. We talked about other——

(Testimony of Mrs. Ella W. Vogel.)

Q. No. Just tell me yes or no.

A. ———things, but it was mentioned all the way down the trail, it was.

Mr. Schell: I move the answer go out as not responsive.

The Court: Motion denied.

Q. (By Mr. Lincoln): Now tell me, please, what these conversations were as nearly as you can remember, that is what Mr. Boles said and what Mr. Mateas said.

A. Well, it started at the top of the trail and Mr. Boles, one of the first things I remember was that Mr. Boles said, "What is the matter with that ornery mule? Does he have a 'bee in his bonnet?'"

The Court: Said that to whom?

The Witness: He to Mr. Mateas. And I could hear everything he said, because I was in front of him.

Q. (By Mr. Lincoln): Did Mr. Mateas say anything to that? [145]

A. Oh, they just laughed about it. And then frequently Mr. Boles tried to give him advice about how to handle the mule. Mr. Boles is head of the Sierra Pack Train in the Sierras.

Mr. Schell: I move to strike that out as a conclusion of the witness and not responsive to any question.

The Court: Is that what he said?

The Witness: Yes. He told us about that on the way down.

The Court: Motion denied.

(Testimony of Mrs. Ella W. Vogel.)

The Witness: He was with the National Geographic Society. And at least half a dozen times on the way to Indian Gardens he offered to ride the mule, to change mules.

Q. (By Mr. Lincoln): That is Mr. Mateas' mule, do you mean?

A. Yes. I can't remember the exact conversations that took place, but I know, for one thing, they talked about maybe it would be better for him to get off and lead the mule. You couldn't help but see that the mule was not the——

The Court: You are just asked as to the conversation.

The Witness: What is that?

The Court: You are just asked as to the conversation.

Mr. Schell: I move that answer go out, then, as to that portion, as volunteered.

The Court: Beginning "You couldn't help," that may go [146] out.

Mr. Lincoln: Pardon me. I understand the lady to say that was a part of that conversation.

Q. Is that right?

A. Yes, sir. Those were the things we talked about going down.

The Court: Please read that portion of the answer beginning, "You couldn't help," Mr. Reporter.

(Answer read by the reporter as requested.)

The Court: That was not said, that part, "you couldn't help," beginning "You couldn't help?"

(Testimony of Mrs. Ella W. Vogel.)

The Witness: No. That was my own words.

The Court: That portion will be stricken and the jury instructed to disregard it. Proceed.

Mr. Lincoln: I am sorry, your Honor. I thought it was a portion of the conversation.

Q. Do you remember any other portion of this conversation between Mr. Boles and Mr. Mateas which you have not given?

A. No; not on exact words, but I know there was a lot said.

The Court: Just tell us the substance of it. You do not have to remember the exact words. What was the substance of what was said and who said it? Now, do not add your own observations. Just say what they said. [147]

The Witness: Well, they kept kind of kidding him about the mule and—I don't know.

Q. (By Mr. Lincoln): When you got down, do you remember when you got down to Indian Gardens? A. Yes.

Q. And did all the party dismount down there?

A. Yes.

Q. Did they have lunch? A. Yes.

Q. Then when you came to mount again did anyone assist you to mount your mule?

A. I don't remember.

Q. Do you remember seeing Mr. Ennis, that is the guide, assisting any of the other ladies to mount their mules?

A. Well, yes. He saw that they were all properly mounted. He adjusted my stirrup straps again.

(Testimony of Mrs. Ella W. Vogel.)

Q. Yes. Did you notice what mule Mr. Boles was on?

A. Well, he and Mr. Mateas had exchanged mules.

Q. You noticed that, did you? A. Yes.

Q. Did you hear any conversation with regard to that exchange of mules between Mr. Ennis, Mr. Boles and Mr. Mateas?

A. Yes. I heard Bob Ennis tell him to get back on [148] his own mule, on the mule he started with.

The Court: Tell who?

The Witness: He told—he told Mr. Boles to ride his mule and Mr. Mateas to ride his mule.

Q. (By Mr. Lincoln): And what, if anything, did Mr. Boles say in answer to that?

A. Well, he said that he was afraid that Mr. Mateas' mule would buck, and that being that he knew how to handle mules better, why, he thought he should ride him.

Q. Well, what did Bob say to that?

A. He said that we were all to ride the mules we started with.

Q. Did you see them change back then to the mules that they had? A. Yes.

Q. And did you see the accident itself when it happened? A. Yes.

Q. Will you describe that as well as you can, that is, tell the jury what you saw?

A. Well, I heard a commotion and, at the same time, my mule got unruly; he kind of braced himself and reared and tossed his head. I was afraid I wouldn't be able to handle him.

(Testimony of Mrs. Ella W. Vogel.)

Mr. Schell: Just a moment. May this witness be admonished [149] not to volunteer information and give her own private thoughts, if the court please? I move that answer go out.

The Court: The portion of the answer where the witness said she was afraid may be stricken, and the jury is instructed to disregard it.

A. And while I was handling my own mule, just out of the corner of my eye, I saw Mr. Mateas thrown. I heard his mule buck before he threw him. I heard Mrs. Mateas scream.

Q. (By Mr. Lincoln): Before this occurred—I am sorry to have to go back a little bit—but before this occurred, when the party were having lunch, was there any talk between them about Mr. Mateas' mule?

A. It was practically the same——

Q. Wait a minute. Just tell me yes or no, please.

A. Conversation? Yes.

Q. Was Mr. Ennis there at the time that this conversation took place?

A. Yes.

Q. Did he take any part in it, do you remember?

A. Well, I don't remember the exact words he said, but I know that he heard it and they all talked about it.

Q. What was said with regard to the actions of Chiggers while Mr. Ennis was there?

A. That he acted like he wanted to buck. [150]

Q. And what else? Did anybody describe the actions that he had carried on before that time?

A. Well, everybody knew it.

(Testimony of Mrs. Ella W. Vogel.)

Mr. Schell: Just a moment. We move that answer go out as not responsive to the question.

Mr. Lincoln: I am sorry. That may go out.

The Court: Motion is granted.

Mr. Lincoln: That may go out.

The Court: You may say only what was said, what was said and done.

The Witness: Well, it is hard to remember a conversation. I know that we talked about it.

The Court: Well, the substance of it.

The Witness: But I can't say exactly what was said.

Mr. Lincoln: We do not expect you to, Mrs. Vogel, to use the exact words.

The Witness: I know that we did talk about it and that Bob was there.

Mr. Lincoln: Your witness.

Cross-Examination

By Mr. Schell:

Q. Mrs. Vogel, you testified at the previous trial of this case, did you not? A. Yes. [151]

Q. You did not give any testimony about any of this conversation with reference to the mule that occurred at Indian Gardens, did you?

A. Well, I don't remember, but if I didn't it was because no one asked me.

Q. You were called by Mr. Lincoln at that time, were you not? A. Yes.

Q. You did not give any conversation as to anything that occurred at the trail down to Indian Gardens, did you?

(Testimony of Mrs. Ella W. Vogel.)

A. I didn't if I was not asked.

Mr. Lincoln: Just a moment, please.

The Court: Do you have an objection?

Mr. Lincoln: Yes, sir; I have. I think it has been——

The Court: No. Just state your objection, Mr. Lincoln. Argumentative, sustained.

Mr. Lincoln: We object to it as entirely incompetent and immaterial.

The Court: I sustained your objection.

Mr. Lincoln: And no proper foundation.

The Court: In that form.

Q. (By Mr. Schell): Now, Mrs. Vogel, did you observe the mule after you left the Indian Gardens?

A. Well, he didn't make much fuss until the bucking.

Mr. Schell: Just answer the questions yes or no. Did [152] you observe the mule after you left Indian Gardens?

A. Yes; I observed all the mules.

Q. Those in front of you and in back of you?

A. Yes.

Q. You turned around to look at the mules in back of you from time to time?

A. Well, they were so close, and I could hear everything that was said, and I looked, yes.

Q. You looked back from time to time?

A. Yes.

Q. Have you discussed this matter with anybody before coming into court?

(Testimony of Mrs. Ella W. Vogel.)

Mr. Lincoln: Objected to as entirely immaterial.

The Court: Overruled.

A. Well, I have told dozens of people about the injustice of it.

Q. (By Mr. Schell): The question is: Have you discussed this case with anybody before coming into court? A. Yes.

Q. Just answer that yes or no.

A. Yes; I have told lots of people about it.

Q. Counsel asked you at the start if you had any interest in the outcome of this litigation. You are very interested in the outcome, are you not?

A. Well, only as a matter of justice.

Q. You are interested to that extent? [153]

A. Yes. I think it is a shame that——

Mr. Schell: That is all.

Mr. Lincoln: Wait a minute. I submit the lady is entitled to finish her answer. May I have the balance of the answer, your Honor?

The Court: She has answered the question.

Redirect Examination

By Mr. Lincoln:

Q. Mrs. Vogel, counsel has asked you about your testimony at the last trial. You were not asked anything about what happened going down the trail?

A. No, sir.

Mr. Schell: That is objected to now, in view of counsel's question, objection to which was sustained.

The Court: Sustained. The answer is stricken.

(Testimony of Mrs. Ella W. Vogel.)

Q. (By Mr. Lincoln): Nor were you asked anything about what happened at Indian Gardens, were you? A. That is right.

Mr. Schell: Same objection, if the court please.

Mr. Lincoln: That went through without my objection, if your Honor please.

The Court: Yes. Overruled as to Indian Gardens.

Q. (By Mr. Lincoln): Nothing was asked you about that, was it? [154] A. That is right.

Mr. Lincoln: Of course you did not testify about it. That is all.

Mr. Schell: Just a minute.

Recross-Examination

By Mr. Schell:

Q. You were called by Mr. Lincoln and had discussed the case with him before being called the last time?

A. No; I was not. I never discussed the case with him before the last trial.

Q. You were called by Mr. Lincoln as a witness?

A. Yes.

Q. At the last trial? A. Yes.

Mr. Schell: That is all.

The Court: Anything further?

Mr. Lincoln: That is all.

The Court: You may step down, Mrs. Vogel.

Mr. Lincoln: That is all, Mrs. Vogel. May this witness be excused, your Honor?

The Court: Is there any occasion to require the further attendance of Mrs. Vogel?

Mr. Schell: No; I think not.

The Court: You are excused from further attendance, Mrs. Vogel. [155]

Mr. Lincoln: Thank you, sir. Mrs. Mateas please.

MRS. JUNE MATEAS

called as a witness by plaintiff, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: June Mateas.

Direct Examination

By Mr. Lincoln:

Q. Mrs. Mateas, are you related to Mr. Mateas who has just testified?

A. Yes; I am.

Q. And what relation, please?

A. He is my husband.

Q. How old are you? A. 32.

Q. So that made you 26 in 1942? A. Yes.

Q. On the 16th of June of 1942 did you and Mr. Mateas go to Grand Canyon? A. Yes.

Q. And had you been there previously?

A. Yes; we had.

Q. What year? [156] A. 1941

Q. In 1941 did you take any trips down the Bright Angel Trail? A. No; we did not.

Q. In 1942 did you take a trip down the Bright Angel Trail? A. Yes, sir.

Q. What date was it, if you remember, that you originally landed at Grand Canyon in 1942?

A. On the 16th of June.

(Testimony of Mrs. June Mateas.)

Q. What time of the day was that?

A. It was in the evening.

Q. Had you planned before then to take the trip down the Canyon? A. Yes; we had.

Q. Did you buy some tickets to take that trip?

A. Yes; we did.

Q. And where did you buy the tickets?

A. In the lobby of the Hotel El Tovar.

Q. Was that on the 16th or on the 17th?

A. It was on the evening of the 16th.

Q. Before you went into the lobby of the hotel to buy any tickets had you seen any circulars or catalogs or advertisements issued by the hotel or distributed there in the hotel? [157] A. Yes.

Q. I call your attention to Exhibit No. 2 which has been placed in evidence here, being a large folder. Was this one of those which you had seen?

A. Yes; it is.

Q. And I also call your attention to Exhibit No. 1-P which has heretofore been introduced in evidence, and ask you if that one was also one of the circulars which you had seen on the 16th?

A. Yes.

Q. On the 16th where was it that you went to buy your tickets?

A. At the accommodation desk in the El Tovar lobby. They had the little alcove set aside for tickets for excursions.

Q. Did you have any conversation there with the representative about this trip?

A. Yes, sir: I did.

(Testimony of Mrs. June Mateas.)

Q. I call your attention to a clause which occurs in a portion of Exhibit 1-P, namely, this:

“Although visitors may venture short distances down these trails on foot, the accepted mode of travel for longer journeys is via the famous ‘Grand Canyon Mules.’ These faithful, sure-footed animals, in charge of experienced guides, hold a thirty years’ record of [158] carrying many thousands of inexperienced riders down the trails and back in perfect safety.”

Did you read that before you purchased tickets?

A. Yes, sir; we did.

Q. Did you have a conversation with the person from whom you purchased the tickets with reference to that particular clause? A. Yes.

Q. Will you tell us, please, what the conversation was as nearly as you can remember it?

A. Well, as near as I remember it, I stated at that time that my husband had not had any experience riding; and the gentleman at the desk told me that nearly all of the people who went down the Canyon had not had any experience riding; and that there hadn’t been any accidents and it would be a safely conducted ride.

Q. When you read that did you read that portion of the circular which I have just read to you?

A. Yes.

Q. And did you believe that? A. I did.

Q. On July 17, 1942, about 11:00 o’clock in the morning, where were you and Mr. Mateas?

A. It was June 17th.

(Testimony of Mrs. June Mateas.)

Q. Pardon me, pardon me. I am sorry. [159]

A. At 11:00 o'clock in the morning we were at the corral at the head of the Bright Angel Trail.

Q. Were there any other people in the corral besides you? A. Yes; there were.

Q. Were there any mules in the corral also?

A. Yes.

Q. Did you see Mr. Bradley there? You know who Mr. Bradley is, do you? A. Yes.

Q. The gentleman who has been referred to here, Did you see Mr. Ennis there at the time, do you remember? A. Senior or Junior?

Q. Yes, Senior. A. No.

Q. You saw Mr. Ennis, Jr., or popularly known as Bob Ennis, did you? A. Yes.

Q. Did you hear any conversation between your husband and Bob before your party started out of the corral? A. Not with Bob; no, sir.

Q. With Mr. Bradley?

A. With Mr. Bradley.

Q. With Mr. Bradley. And what was that conversation, please? [160]

A. Well, my husband told Mr. Bradley that he would like to ride near me, and Mr. Bradley put him at the end of the train; and that was the conversation that took place.

Q. Going down the trail did you notice anything with regard to the mule which your husband was riding on any different from any of the other mules? A. Yes; I did.

Q. What did you see?

(Testimony of Mrs. June Mateas.)

A. Well, I would notice the mule when I would look back to see how he was doing, and I would notice the mule at different times try to pass the other two mules ahead of him.

Q. When you got down to Indian Gardens all the party stopped, I believe, and rested, is that right? A. Yes, sir.

Q. While you were there was there any conversation among the party in the presence of Bob Ennis with regard to the actions of Mr. Mateas' mule? A. During lunch time?

Q. Yes.

A. I am sorry. I didn't hear any conversation that took place at that time.

Q. All right. When the party was ready to get on the mules again did Bob Ennis assist you on your mule? A. Yes; he did. [161]

Q. Did you see him assist any of the other ladies? A. Yes.

Q. Did you notice which mule Mr. Mateas was on? A. Yes.

Q. And which was that?

A. It was the mule preceding the last mule, making it Mr. Boles' mule.

Q. Was Mr. Boles related to you or Mr. Mateas in any way? A. No.

Q. Had you ever seen him before? A. No.

Q. Ever seen his wife before? A. No, sir.

Q. Do you know where he now is?

A. I think I do; yes, sir.

Q. And where do you think he is?

A. I think he is in Ohio.

(Testimony of Mrs. June Mateas.)

Q. Anyway, so far as you know, he is not in California? A. So far as I know he is not.

Q. Or his wife, either? A. That is right.

Q. And which mule was Mr. Boles on when your husband was on Mr. Boles' mule? [162]

A. He was on my husband's mule.

Q. Did you overhear any conversation then or about that time while these two men were on these opposite mules between them and Bob?

A. Between Mr. Boles and——

Q. Just answer yes or no.

A. Oh, excuse me. Yes.

Q. Between Mr. Boles and Bob, was it?

A. Yes.

Q. And what did you overhear?

A. I overheard Mr. Boles say that the reason they had changed mules was that my husband's mule was constantly trying to pass the other mules and get ahead of them, and that he was a skittish mule and my husband was afraid of the mule; and that he thought or he knew he could ride the mule and it would be a better idea for my husband to ride his mule, Mr. Boles' mule. And that is the conversation that took place.

Q. Did Bob make any reply to that?

A. Bob told him at that time that we had to remain on the mules we were assigned at the top of the hill.

Q. And did they then change back?

A. They then changed back.

Q. You saw them do that? A. I did.

(Testimony of Mrs. June Mateas.)

Q. Sometime after that there was this accident in which your husband was involved, was there?

A. Yes, sir.

Q. Did you see that yourself?

A. Well, yes; I did.

Q. How far below Indian Gardens would you say that was in time?

A. A half an hour to an hour.

Q. And what was it that you saw?

A. Well, I saw the mule when I turned around. I heard the commotion. I heard one of the girls ahead of me scream and I turned around and I saw the mule bucking, and after about the second buck that I saw, I saw my husband go over his head, thrown over the mule's head and land on his back at the side of the trail. [164]

* * * * *

The Court: The clerk calls my attention to the fact that it does not appear of record here that dismissals have been entered as to the fictitious defendants.

Mr. Lincoln: Oh, I am sorry, your Honor.

The Court: I assumed that that was done prior.

Mr. Lincoln: I thought that was done long ago, sir. We will ask at this time that such dismissal be made by your Honor.

The Court: Very well, the case is dismissed as to all fictitious defendants and as to all of the defendants other than the Fred Harvey Corporation. Is that correct?

Mr. Lincoln: Yes, sir. I had in mind your Honor asked us at the outset if that matter now was only as against the Harvey Company, and I assumed by that that we had complied with the proprieties in making the dismissals otherwise.

The Court: Very well. The record is now clear.

Mr. Lincoln: Thank you, sir.

The Court: And the case is dismissed as to all other defendants except Fred Harvey, a corporation. [170]

* * * * *

Mr. Schell: That is correct. Mr. Wilson, will you come forward? I am sorry to do this.

The Court: The jury will understand that this is a witness called out of order on behalf of the defendant.

WILL WILSON

called as a witness by defendant, being first sworn, was examined and testified as follows:

The Clerk: What is your name, sir?

The Witness: Will Wilson.

Direct Examination

By Mr. Schell:

Q. Will you try to keep your voice up, Mr. Wilson, so that everybody can hear you?

A. Okay.

Q. Where do you live now?

A. Alameda, California.

Q. In 1942 where did you live?

(Testimony of Will Wilson.)

A. I lived at the verge of the Grand Canyon.

Q. How old are you, Mr. Wilson?

A. Well, something lacking 60.

Q. What has been your occupation?

A. Well, mostly sitting in the saddle.

Q. Doing what type of work? [184]

A. Riding.

Q. Riding?

A. Sitting in the saddle.

Q. During 1940, '41 and '42 were you working at the Grand Canyon?

A. I went to the Canyon in 1940 and left there in 1945.

Q. What type of work did you do while you were there at the Canyon?

A. I was a guide on the trail.

Q. A guide on the trail?

A. That is right.

Q. Did you have occasion to go up and down the Bright Angel Trail from time to time?

A. Well, every day, you might say.

Q. Were you acquainted with a mule called Chiggers?

A. That's right. I rode the mule quite a while, myself.

Q. You say you rode the mule. When did you ride him?

A. I rode him in '40, put him on the dude train in '40.

Q. You say you rode him?

A. Yes, sir.

(Testimony of Will Wilson.)

Q. You rode him as guide mule, did you?

A. I rode him as guide mule for a while; yes.

Q. And then, later on, you put him in the——

A. Put him in the dude string.

Q. I see. Did you use that mule from time to time?

A. From time to time is right.

Q. And can you tell us about this mule, what you noticed about his disposition and the way he acted?

A. Well, I think he was one of the gentlest mules I had on the trail.

Mr. Lincoln: I ask that the answer be stricken as not responsive and a conclusion of the witness.

The Court: Motion granted.

Q. (By Mr. Schell): As part of that using him as a guide mule was that part of his training?

A. Yes; that's right.

Q. As a guide mule was he gentle or otherwise?

A. He was very gentle.

Mr. Lincoln: Objected to—pardon me. Objected to as no foundation, calling for a conclusion of the witness, incompetent, irrelevant and immaterial.

The Court: Overruled. The answer may stand.

Q. (By Mr. Schell): Then when you put him on the dude string what did you find about his actions?

A. Well, he was still perfectly gentle to men, women, children and all of them.

Q. In using him as a guide mule did you always use [186] him in the same position on the string or was he in different positions?

(Testimony of Will Wilson.)

A. We put him out just as he came. If there was a lady on him, we put him out in the front of the men; if there was a man on him, we put him back of the women; no one place for the mule to work.

Q. During the time that you were working, say, up to '42, was he sometimes on the end of the string?

A. Yes, sir.

Q. And on various places in the string, is that right? A. That is right.

Q. Did you ever have any trouble with this mule at any time while using him?

A. No trouble whatever.

Mr. Schell: That is all. Wait just a minute. Just a minute, Mr. Wilson. Mr. Lincoln may want to ask you some questions.

Cross-Examination

By Mr. Lincoln:

Q. Mr. Wilson, really, this mule was one of the gentlest and kindest and simplest little mules you had?

A. That is what I found the mule to be with me.

Q. What, sir?

A. That is what I found the mule to be with me.

Q. Kind of a pet, wasn't it?

A. He was very much of a pet.

Q. And you really used this mule more to have ladies ride on him, didn't you, than you had men?

A. We had ladies and men and all. We used him more as a guide to lead them on.

(Testimony of Will Wilson.)

Q. You did not select any particular mule for any particular person, did you?

A. Well, at times I did and at times I didn't. We generally selected certain mules for women.

Q. Pardon, sir?

A. Sometimes we selected certain mules for children and women, and it depended on the ages of the women and children.

Q. And at those times you would select this particular mule because of his gentleness, wouldn't you?

A. That is one reason; yes.

Mr. Lincoln: That is all.

Redirect Examination

By Mr. Schell:

Q. By the way, may I ask a couple of questions I overlooked? Mr. Wilson, are you familiar with the equipment that these mules had on?

A. Well, I should be; yes. [188]

Q. What was it?

A. Well, it would be a saddle, saddle packs, raincoats, and bridles and halters.

Q. And did the bridles have reins on them?

A. They certainly did.

Q. And what instructions, if any, were given to the people who rode them?

A. I asked everybody not to ride sideways and keep the mules up close together.

The Court: Just a moment.

Mr. Lincoln: May the answer go out, your Honor, until I object?

The Court: The answer will be stricken.

(Testimony of Will Wilson.)

Mr. Lincoln: We would object to that as incompetent, irrelevant and immaterial, for this particular reason: As I see it, what may have been the custom heretofore is not a matter which is before this court at the present time.

The Court: The objection will be sustained to the question in that form, it not indicating any particular time.

Q. (By Mr. Schell): During the year of 1942 and prior thereto, state whether or not it was the custom of the guides to have the dudes hold the reins? A. That is right.

Mr. Lincoln: Well, wait a minute. We will object to that as being entirely incompetent for the particular [189] reason, as I understand it, that this gentleman had ceased to ride this particular mule in that particular year, and we still are not concerned with custom unless it could be shown that he had knowledge of the customs.

Mr. Schell: I do not think that is true, your Honor.

The Court: Is your question directed to all mules?

Mr. Schell: To the entire course of conduct of mules, yes, all mules.

Mr. Lincoln: For that reason we submit it is still more incompetent.

The Court: Objection overruled. Do you understand he is questioning you about the custom with respect to all mules?

(Testimony of Will Wilson.)

The Witness: All mules, all trail mules, all of them.

The Court: Were all people who rode all the mules——

The Witness: That's right.

The Court: ——in 1942 instructed to hold the reins?

The Witness: That's right, because I instructed them to hold the reins in your hand.

Q. (By Mr. Schell): What is the purpose of that?

A. Well, the mule might stumble and it would help the mule to kind of pick his head up; in other words, the mule could jump and you could pull up on your reins.

Q. Are the mules shod? A. Yes, sir.

Q. What is the general nature of the trail?

A. Well, it is just a little bit rocky.

Q. Rocky? A. A little bit rough.

Q. And state whether or not the saddles and so forth squeak as the riding goes on?

A. That's right; they do.

Q. From your experience, are you able to hear conversation any distance back of you when you were riding down the trail?

A. Not too far back. The first person can take my conversation and then relay it back, but you cannot hear the conversations in the back of a party.

(Testimony of Will Wilson.)

Two mules back and you can't hear what the person says on that trail, unless you are on a switch back and they come up over you.

Mr. Schell: That is all.

The Court: Any further questions?

Mr. Lincoln: Just a minute. Yes, sir.

The Court: Just a moment, Mr. Wilson.

The Witness: More?

Recross-Examination

By Mr. Lincoln:

Q. How many people would you say you have taken down that trail? [191]

A. Well, I didn't keep count of them. I guided 10 practically every day I worked there for five years.

Q. Every day including Sunday?

A. We didn't have no Sunday.

Q. You did not drive them on Sunday?

A. We didn't have no Sunday. We worked all days.

Q. That is what I mean, seven days a week?

A. And we worked at night.

Q. Seven days a week?

A. That is right. It would be eight days a week anyway you figure it.

Q. So, then, you would take at least 70 people up or down every week, is that right?

A. That is right.

(Testimony of Will Wilson.)

Q. For a period of two years, is that right?

A. For five years.

Q. Five years, which would make something like 18,000 people, if my arithmetic is correct.

A. It might be something like that.

Q. And how many times did you take this mule Chiggers down there?

A. Well, I couldn't count the exact time, but I had him from time to time, from the time I started in until after I left there, after he went into the dude string.

Q. Did you have him in the dude string for a period [192] of two years?

A. Well, yes, sir. He had been on the dude string for five years.

Q. For five years. Of course, you did not use him, I suppose, every time you went down, did you?

A. Not every day.

Q. Pardon?

A. Not every day, no; but somebody else did.

Q. Oh, somebody else did?

A. That is right, or I did.

Q. He was used every single day, is that right?

A. That is right.

Q. When these people hold the reins tight, that is, as I understand it, for the purpose of holding up the mule in case he stumbles, is that right?

A. It helps; yes.

Mr. Schell: Objected to as assuming something not in evidence.

The Witness: I didn't say "tight." I said, "hold them in your hand."

(Testimony of Will Wilson.)

Q. (By Mr. Lincoln): Oh, "just hold them in your hand"? A. That is right.

Q. But you did not mean to hold them tight?

A. I didn't mean to hold them tight. If we do, the mules can't travel. [193]

Q. You are not supposed to hold them tight, is that right? A. That is right.

Mr. Lincoln: Would you read the question?

The Court: Please read the question, Mr. Reporter.

(Question read by the reporter.)

A. That is right; just hold them in your hand, I told them.

Q. (By Mr. Lincoln): What would happen if you did hold them tight?

A. Well, the mule can't travel on tight reins.

Q. Can't go at all?

A. That would stop the mule.

Q. I see. So you told them simply to hold the reins loose on the saddle, is that right?

A. That is right; "hold them in your hand; keep them in your hand."

Mr. Lincoln: "Keep them in your hand." That is all.

Mr. Schell: That is all. You say step down. May Mr. Wilson be excused?

Mr. Lincoln: As far as I am concerned, yes.

The Court: You are excused from further attendance, Mr. Wilson. Do you desire to recall Mrs. Mateas now?

Mr. Lincoln: Yes. And, if your Honor will bear with me just a moment. [194]

JUNE MATEAS

recalled.

Direct Examination

(Resumed)

By Mr. Lincoln:

Q. Mrs. Mateas, I show you this Exhibit No. H, which is the document which was supposed to have been written at the hospital about the 6th of July, 1942, and ask you if you ever saw that document before yesterday?

A. This particular document?

Q. Yes. A. Not this particular document.

Q. Did you ever see one like it before yesterday?

A. I can't say whether I saw one like it, Mr. Lincoln, as to color and content.

Q. But you saw something you think that was like it? A. I saw something.

Q. And where was the something which you speak of now that you saw, for the first time?

A. A representative of the Harvey Company had it in his hands.

Q. I see. And about when was that that this representative of the Harvey Company had this paper of some kind in his hand?

A. During the time we were at the Grand Canyon Hospital. [195]

Q. When was that, do you remember, with reference to the time of the accident itself?

A. I would say a week or a week and a half after the accident, roughly speaking.

Q. What time of day was it?

A. It was in the afternoon.

(Testimony of June Mateas.)

Q. What was Mr. Mateas' condition that afternoon?

Mr. Schell: That is objected to as calling for a conclusion and speculation, no foundation laid, and no definite time fixed.

The Court: Sustained in that form.

Q. (By Mr. Lincoln): What had Mr. Mateas done that morning, if you know?

A. That morning he had been trying to learn to walk again.

Q. Could you tell us whether that was tiring to him?

A. It was very tiring to him. He would have to go back to bed.

Q. Were you with him when he was attempting to walk?

A. Oh, yes; I would have to help him.

Q. You were there with him every day during the daytime, at any event, were you?

A. I was there all day and that night; yes, sir.

Q. And when this representative came there was Mr. Mateas sitting up or walking or where was he? [196]

A. He was in bed.

Q. What did this representative say when he first came there, if you remember?

Mr. Schell: That is objected to as incompetent, irrelevant and immaterial, not within the issues.

Mr. Lincoln: I respectfully submit—

The Court: Overruled.

Mr. Lincoln: Pardon, sir?

The Court: Overruled.

(Testimony of June Mateas.)

The Witness: Will you repeat the question, please?

(Question read by the reporter.)

A. In substance, he said he was a representative of the Harvey Company and he wanted to get an account of the accident, and that undoubtedly the Harvey Company would make some sort of a settlement. And I think that was the substance.

Q. (By Mr. Lincoln): Then did he ask questions of you and Mr. Mateas? A. Yes; he did.

Q. Which one of you? Was it you or Mr. Mateas that gave the answers?

A. It was Mr. Mateas that gave the answers.

Q. And then what would this representative do when he received those answers?

A. He wrote them down. [197]

Q. Did you see what he was writing at any time?

A. No; I did not.

Q. Did you read any of the writing at any time?

A. I did not.

Q. And did you see Mr. Mateas read any of that writing at any time? A. No, sir.

Q. Did this representative read over this writing at any time? A. To us?

Q. Yes.

A. Yes; he read something back to us.

Q. He read something? A. Yes.

Q. Did he give you a copy of the writing?

A. He did not.

Q. Did you ask him for a copy?

A. Yes, sir; we did.

(Testimony of June Mateas.)

Q. And what answer did he make to that?

A. He said it was not necessary for us to receive a copy of what he had written down.

Q. Any particular reason given for that?

A. He said it would be—he said he was going to turn it in to the Harvey Company and, as I stated before, they would contact us to make a settlement off of his report. [198]

Q. You believed that, did you?

A. Yes; I did.

Q. Now, Mrs. Mateas, will you be good enough to read that exhibit which I have just presented to you and tell me if you find anything in there which was not said by either Mr. Matheas or yourself to this representative of the Harvey Company?

A. I have read it.

Q. Before you answer that question, Mrs. Mateas, may I ask you this: Is this the first time you ever read that document?

A. The first time I have ever read it; yes.

Q. Now, do you find anything in there which either Mr. Mateas or you did not tell the investigator of the Harvey Company at the time that he wrote something down on a piece of paper?

A. Yes; I do.

Q. And what page do you find that on?

A. It is on the third page.

Q. Would you be kind enough to read that portion which you discover was not read or was not overheard by you—no. Let me withdraw that for a moment. When the investigator read this over,

(Testimony of June Mateas.)

do you see any portion in there which you remember he did not read? A. Yes; I do. [199]

Q. And that is the same portion which you are now referring to, is it? A. Yes.

Q. Will you be good enough to read that, please?

A. It states here: "I did not say anything to the guide that I would like to ride this mule, and I do not know if the other man said anything to the guide." I believe that is just two sentences.

Q. Have you and Mr. Mateas been living together all the time since 1942? A. Yes, sir.

Q. And still are? A. Yes, sir.

Q. During that time and after he came back from the Grand Canyon what was done in Los Angeles or any treatment which may have been given to him for the injury?

A. He had his back strapped before we left the Canyon, and at the time we came to Los Angeles he underwent a series of diathermy treatments and prescribed rest.

Q. What physician attended him at that time?

A. Dr. Sloan.

Mr. Lincoln: Mr. Reporter, that is Leigh, L-e-i-g-h, Dr. Leigh Sloan.

Q. And about how long did Dr. Sloan's treatment continue? [200]

A. About six to eight weeks.

Q. What do you find Mr. Mateas' condition to be at the present time?

A. His condition at the present time——

(Testimony of June Mateas.)

Mr. Schell: Just a moment. That is objected to as no foundation laid, if the court please, calling for a conclusion of a lay witness.

The Court: Sustained in that form.

Q. (By Mr. Lincoln): What have you observed with relation to how Mr. Mateas acts or reacts at the present time?

A. He still suffers pain as a result of his injury.

Mr. Schell: I move that answer go out, if the court please, as a conclusion.

The Court: Do you mean he appears to suffer pain?

The Witness: Yes, sir; he does.

Q. (By Mr. Lincoln): Does he complain to you?

A. He complains to me; yes, sir, he does.

Q. And does he say what particular portion of his body that that pain is in?

A. He complains of his back and of his right hip at different times, at different intervals; and I have seen instances of happenings that have occurred since his back injury. He would try to bend over and would get bent over and couldn't get back up. [201]

The Court: Motion denied.

Mr. Schell: Mrs. Mateas——

Mr. Lincoln: If you will pardon me?

Mr. Schell: Oh, certainly.

Mr. Lincoln: Just one question.

Q. Mrs. Mateas, did the Harvey Company make a settlement with either you or Mr. Mateas?

A. No, sir; they did not.

(Testimony of June Mateas.)

Q. Did they make any offer of settlement to either of you? A. No, sir.

Mr. Schell: Just a moment. We object to that as improper and ask that the court fully instruct the jury.

The Court: The jury is instructed to disregard the witness's answer to the last question. Do you desire any further instruction be given the jury?

Mr. Schell: That it has no place in the case at all and should not be considered in any way at all.

The Court: As to whether or not the Harvey Company offered any settlement to the plaintiff in this case has no place here. You are instructed to disregard any testimony or any questions or answers relating to that question. [202]

Cross-Examination

By Mr. Schell:

Q. Mrs. Mateas, you testified yesterday about a conversation regarding the mule with the guide that you overheard at the water trough, is that right? A. That is right.

Q. And that is the only conversation you heard with reference to the mule and the change from one mule to the other? A. Yes, sir.

Q. It occurred at the water trough?

A. At the water trough.

Q. And that was a conversation at the time when Mr. Mateas was on the other mule, is that right? A. That is correct.

(Testimony of June Mateas.)

Q. How far had you ridden to go to the water trough? A. We mounted at the water trough.

Q. You mounted at the water trough?

A. Yes, sir.

Q. And this conversation took place after that mounting, is that right? A. Yes, sir.

Q. Mrs. Mateas, do you remember testifying at the previous trial of this matter? A. I do.

The Court: You may show it to the witness.

Q. (By Mr. Schell): Calling your attention to page 50, commencing with line 15 down to line 10 on page 51, will you read that to yourself? Have you read it? A. Yes, sir.

Q. Did you so testify? A. Yes, sir; I did.

Mr. Schell: May I read it now, if the court please?

The Court: You may.

Mr. Schell:

“Q. But in any event, there you had lunch and stopped for a little while?

“A. That is right.

“Q. When you went on from there did anything happen with relation to Mr. Mateas and the mule?

“A. Well, at the water trough we stopped to water the mules.

“Q. Yes.

“A. And he got onto another man's mule that was there and the guide made him exchange mules, and then when we proceeded, his mule tried to get ahead of the rest of ours.

(Testimony of June Mateas.)

“Q. Now just a minute. At the water trough when they exchanged the mules did you have any conversation with the guide or hear any conversation between [204] him and Mr. Mateas? A. No.

“Q. All right. And so they exchanged mules, and then did they exchange them back again?

“A. Yes. The guide told them to revert to their original mules.

“Q. Well, then, after that, what happened?

“A. Well, then we proceeded down the trail towards the bottom of the Canyon.”

You so testified, did you? A. I so testified.

Q. Mrs. Mateas, you have been asked some questions with reference to the document which is in front of you. I think it is marked Exhibit H. May I approach, please?

The Court: You may.

Q. (By Mr. Schell): You have now read that document completely, have you? A. Yes, sir.

Q. And the statements on the first page of statements are correct? A. Yes, sir.

Q. And that is Mr. Mateas' signature that appears on the bottom of that first page?

A. Yes, sir.

Q. Now, you read the second page? [205]

A. Yes, sir.

Q. The statements on there are correct?

A. Yes, sir.

(Testimony of June Mateas.)

Q. That is the information that was given at that time to the man who wrote it down?

A. Yes, sir.

Q. And the signature of Mr. Mateas on the bottom of that page is his signature?

A. Yes, sir.

Q. "Elmer Mateas"? A. That is right.

Q. "Elmer H. Mateas," I believe it is?

A. Yes; that is right.

Q. Now, going to the third page, you say that on the part that was not stated, was not read back, are two sentences? A. Yes, sir.

Q. Starting with "I did not say anything to the guide that I would like to ride the mule, and I do not know if the other man said anything to the guide," is that right? A. That is right.

Q. That is just really one sentence, isn't it? There is no period there.

A. That is right. No; that is a comma.

Q. With the exception of that sentence, did you give [206] the information or Mr. Mateas give the information contained on that page?

A. Yes, sir.

Q. And that is likewise his signature at the bottom of that page, "Elmer H. Mateas"?

A. Yes, sir.

Q. Now, with the fourth page, is the information on that page correct? A. Yes, sir.

Q. And that is Mr. Mateas' signature, "Elmer H. Mateas," on the bottom of that page?

A. Yes, sir.

(Testimony of June Mateas.)

Q. With reference to the fifth page, is the information on that page correct? A. Yes, sir.

Q. And that is Mr. Mateas' signature on the bottom of that page? A. Yes, sir.

Q. "Elmer H. Mateas"? A. That is right.

Q. And on the sixth and last page, in the information on that page information you gave or Mr. Mateas gave this gentleman at the time?

A. Yes, sir.

Q. Is that correct? [207] A. Yes, sir.

Q. And is that the signature of "Elmer H. Mateas" at the bottom? A. Yes, sir.

Q. You were present, Mrs. Mateas, at all times while this statement was being taken?

A. Yes, sir; I was.

Q. And it was written out there at that time in pen and ink in your presence? A. Yes, sir.

Q. And the statement was then handed to Mr. Mateas, was it not? A. It was read to him.

Q. It was read to him but it was not handed to him? A. Not at that time.

Q. Was it handed to him at any later time?

A. After it was read to him it was handed to him; yes, sir.

Q. Now, did you see Mr. Mateas sign each and every page at that time? A. I did.

Q. Do you know whether or not Mr. Mateas was in the habit of signing documents he did not read?

Mr. Lincoln: We will object to that as entirely immaterial. [208]

The Court: Sustained.

(Testimony of June Mateas.)

Q. (By Mr. Schell): When is it that you asked for a copy of this document? A. At that time.

Q. Before Mr. Mateas signed it?

A. Yes, sir.

Mr. Schell: That is all.

The Court: Have you any further questions?

Mr. Schell: I think not. Just a moment. That is all.

Redirect Examination

By Mr. Lincoln:

Q. Mrs. Mateas, had Mr. Mateas signed this document before it was handed to him, as you have described? A. Before it was handed to him?

Q. Yes. I understand your testimony to be that this representative of the Harvey Company read over something to you and then he handed this paper to Mr. Mateas.

A. He placed it on a bedside table. It was not handed directly to Mr. Mateas. It was placed on a beside table for his signature.

Q. What did the representative then say with relation to the signature?

A. He said it was just a matter of form, I believe. He said, "Either initial or sign the pages."

Q. Did Mr. Mateas read over the document before he signed it? A. No, sir; he did not.

Mr. Lincoln: That is all.

Mr. Schell: Just one second, if the court please. Might I suggest, possibly we have the recess now, if your Honor please? It will take me a little time to find something.

(Testimony of June Mateas.)

The Court: Do you have further questions of this witness?

Mr. Schell: Yes; I have one or two further questions.

The Court: Very well, we will take the morning recess at this time, ladies and gentlemen of the jury.

(The court admonished the jury.)

You are now excused for a five-minute recess. You may step down.

(Short recess.)

The Court: Is it stipulated, gentlemen, that the jurors are all in their places?

Mr. Lincoln: Yes, sir.

Mr. Schell: So stipulated.

The Court: You may proceed. [210]

Recross-Examination

By Mr. Schell:

Q. Mrs. Mateas, do you remember distinctly all the conversation that took place back in '42 between yourself, Mr. Mateas, and this representative of the Harvey Company? A. Word for word?

Q. The substance of it. Just answer that yes or no, please. Do you remember distinctly or not?

A. You are asking me in substance?

Q. Yes. A. Yes.

Q. You remember the substance of all of the things that were in the statement, with the exception of that one sentence, as having been said?

A. Yes.

(Testimony of June Mateas.)

Q. To your knowledge, did Mr. Mateas ever receive a previous injury? A. To his back?

Q. Any previous injury in an accident.

A. In an accident?

Q. Yes. A. No, sir.

Q. Isn't it a fact that he was plaintiff in some litigation involving injuries received in an automobile accident? [211]

A. Not personal injuries; no, sir.

Q. Not personal injuries?

A. Not to my knowledge; no, sir.

Mr. Schell: That is all.

The Court: Have you any further questions?

Mr. Lincoln: Yes. May I, just one question, your Honor?

Redirect Examination

By Mr. Lincoln:

Q. Mrs. Mateas, Mr. Schell asked you with reference to your testimony in the former case, in which he read to you this testimony, saying that you did not have any conversation with the guide or hear any conversation between him and Mr. Mateas; and I believe you said that was correct and that was your testimony? A. That is correct.

Q. Did you hear any conversation between the guide and any other person at that time, that is, at the time when you were down there at the watering trough and the mules were being exchanged? A. I did.

Q. And who was the other person?

A. The conversation was with Mr. Boles and Bob Ennis. [212]

Mr. Lincoln: And the guide.

(Testimony of June Mateas.)

Q. (By Mr. Schell): You did not mention that conversation at the time that these questions were asked of you in the other case, did you?

A. I was not asked. No, sir.

Mr. Schell: That is all.

Q. (By Mr. Lincoln): That particular question was not asked you in the other case, was it?

A. It was not.

Mr. Lincoln: That is all.

The Court: Do any members of the jury have any questions? You may step down.

MRS. ALICE RAYLE

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Alice Rayle, Mrs. Alice Rayle.

The Clerk: Will you spell your last name, please?

The Witness: R-a-y-l-e.

Direct Examination

By Mr. Lincoln:

Q. Where do you live, Mrs. Rayle?

A. In San Marino. [213]

Q. Pardon? A. In San Marino.

Q. I am sorry. Will you speak up just about as loud as you can? This lady at the end and this gentleman at the end cannot hear you very well unless you do speak up quite loud. Thank you.

Do you know Mrs. Mateas who has just testified?

A. Yes, sir.

(Testimony of Mrs. Alice Rayle.)

Q. And you know Mr. Mateas who sits here?

A. Yes, sir.

Q. Are you related to either of them in any way?

A. No, sir.

Q. When did you first meet either of them?

A. At the time at the corral when we were getting ready to mount the mules.

Q. In 1942 was that?

A. Yes.

Q. Was that the time of the injury to Mr. Mateas?

A. Yes.

Q. Were you a member of that party who went down the Bright Angel Trail that day?

A. Yes, sir.

Q. I show you this photograph which has been placed in evidence as No. 4 and ask you, please, if you recognize that as being a photograph of anything that you remember? [214]

A. Well, that is a photograph of the party that went down the trail together of which I was a member.

Q. Do you find your picture in that photograph?

A. Yes, sir.

Q. And which one are you, please?

A. I am the one in back of Bob Ennis, the rider.

Q. Immediately. Then you were the first dude, if I may use the expression, in the party?

A. Yes, sir.

Q. Do you remember when the party got down to Indian Gardens that day?

A. Yes, sir.

Q. And did it stop then for lunch at that time?

A. Yes, sir.

(Testimony of Mrs. Alice Rayle.)

Q. After lunch and as the party were about to resume their journey did anybody assist you in mounting your mule?

A. Well, I believe—I am not sure. I don't remember whether we needed assistance or not.

Q. Do you remember whether the guide assisted any of the other ladies in mounting their respective mules? A. I don't recall.

Q. You know Mr. Boles, do you, who was a member of the party? A. Yes, sir.

Q. Do you remember whether or not Mr. Boles got on [215] the same mule that he had ridden down? A. I remember that he did not.

Q. And do you remember whether Mr. Mateas got on the same mule which he had ridden down?

A. No; he didn't.

Q. They were on different mules, were they?

A. Yes.

Q. Did you overhear at that time, that is, at the time they were on these different mules, any conversation between either Mr. Mateas or Mr. Boles with Bob Ennis, the guide? A. Yes, sir.

Q. Do you remember whether it was Mr. Mateas or Mr. Boles who talked with the guide?

A. Mr. Boles.

Q. Mr. Boles. Do you remember what the conversation was? I do not mean, of course, Mrs. Rayle, the exact words, but, as you can remember, perhaps the substance of what their conversation was?

(Testimony of Mrs. Alice Rayle.)

A. Just the substance would be the reason for their changing the mules; that the mule Mr. Mateas rode bothered him, and Mr. Boles wanted to change with him, and they did that at Mr. Boles' suggestion.

Q. Did you hear any answer given to that by Mr. Ennis? [216]

A. Well, Mr. Ennis made them resume their own mounts that they had when they originally left the trail.

Q. Do you remember what he said, what his words were or the substance of the words?

A. Well, the substance would be that they have to go down, continue the trail on the mules on which they started.

Q. Did Mr. Boles give some reason for the changeover?

Mr. Schell: Just a moment. We object to that as leading and suggestive. I submit the question has already been asked and answered.

Mr. Lincoln: I am sorry. We withdraw that question.

Q. Did Mr. Mateas participate in that conversation, do you remember?

A. I don't remember.

Q. Have you given us now all of the conversation which you can remember, particularly that on the part of Mr. Boles?

A. I believe so. It all had to do just with the reason for their changing.

Mr. Lincoln: That is all. Your witness.

Mr. Schell: No questions.

The Court: You may step down, Mrs. Rayle.

Mr. Lincoln: May this witness be excused, your Honor?

Mr. Schell: So stipulated. [217]

The Court: You are excused from further attendance.

Mr. Lincoln: Thank your Honor very much. I find myself, your Honor, in the predicament of not having any further witnesses at hand. My reason for that—oh, yes, Dr. Cox. I am sorry. Dr. Cox, will you come forward, please? Thank you, Mr. Schell. [218]

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EMMETT MYRON ENNIS

called as a witness by defendant, having been previously sworn, was examined and testified as follows:

The Clerk: You were sworn the other day, were you not?

The Witness: Yes, sir.

The Clerk: Just be seated.

Direct Examination

By Mr. Schell:

Q. Mr. Ennis, you have a son, Bob Ennis?

A. I do.

Q. How old is he now? A. 23 years old.

Q. Do you know whether or not Bob was the guide on the trip that Mr. Mateas was on?

A. He was.

(Testimony of Emmett Myron Ennis.)

Q. How long had Bob lived at the Canyon at that time? A. He was born there.

Q. During the early part of his life where did he live? A. At the Grand Canyon. [252]

Q. Do you know of your own knowledge that he had been up and down that trail many times?

A. Many, many times.

Q. Do you remember about when he first went up and down that trail?

A. The first time he went down the trail he was three years old. I put him on mule and took him down the Canyon. My mule wouldn't walk so I put him in front of him. He looked back over his shoulder and he said, "Ha! I am a guide, Dad."

Q. Thereafter did he go back and forth down that trail with mules?

A. He was backwards and forwards with the guides any time that there was a vacant mule with the guides from the time he was six years old on. The guide would take him with him.

Q. Then did he start taking parties down as a guide on his own later on? A. In 1941.

Q. 1941. And where did he do his——

A. Oh, I would say 1940 on or 1941. 1941, that is when he went on the payroll.

Q. That is when he went on the payroll?

A. Yes, sir.

Q. And do you know where he did his work at that [253] time in 1941?

(Testimony of Emmett Myron Ennis.)

A. At the Bright Angel and down the Kaibab Trail.

Q. Was he on the north rim in 1941?

A. No. He was on the north rim in 1940.

Q. And there are two trails. Is there a trail also from the north rim down to the bottom of the Canyon?

A. The Kaibab Trail is a cross-connection trail. It comes from the south to the north rim or vice versa from the north to the south rim.

Q. In other words, you call the whole trail from one side to the other the Kaibab, is that right?

A. That is right.

Q. Then during the time from the time he went on the payroll in 1941 up to June 17th did he do regular guide work?

A. He guided during his school vacation.

Q. I take it there are more people going down in the summertime, more tourists, than there are in the winter, is that right?

A. That is right.

Mr. Schell: That is all.

Mr. Lincoln: No questions.

The Court: You may step down, Mr. Ennis.

Mr. Schell: Mr. Bradley. [254]

JOHN DAVIS BRADLEY

called as a witness by defendant, being first sworn,
was examined and testified as follows:

The Clerk: Please state your name.

The Witness: John Davis Bradley.

Direct Examination

By Mr. Schell:

Q. Mr. Bradley, where do you live?

A. In the Grand Canyon, Arizona, National
Park.

Q. How old are you? A. 38.

Q. By whom are you employed?

A. By Fred Harvey Transportation Company.

Q. How long have you been so employed?

A. Since July 13, 1933.

Q. Were you working there at the Grand Can-
yon for Fred Harvey in June of 1942?

A. Yes, sir.

Q. What was your position there at that time?

A. Trail foreman.

Q. A little louder. A. Trail foreman.

Q. As such did you have charge of the stables
or corrals in which the animals were kept? [255]

A. Yes, sir; I had charge of all riding and
packing stock, along with the guide and the men
that worked for me.

Q. How long had you had that position?

A. Since '36 in the first of April.

Q. Had you had any experience with animals
before going to work for Fred Harvey?

A. It has been my life's work; yes, sir.

(Testimony of John Davis Bradley.)

Q. And did you have experience particularly with mules? A. Yes, sir.

Q. About how many years' experience had you had with the handling of mules prior to 1942?

A. Well, I could accurately say since I was 12 years old. That is when I went to making a hand for myself.

Q. Can you tell us when this mule Chiggers was acquired? A. In 1938.

Q. Do you know where he came from?

A. From Wichita, Kansas, I believe.

Q. What course of training did Chiggers have?

A. He had the same course of training as all the stock have, in general. As he was purchased along with 25 others in a carload, and had the same training as the balance of the car. [256]

Mr. Lincoln: I ask that the answer go out as not responsive.

The Court: Motion granted.

Q. (By Mr. Schell): What was that training, Mr. Bradley? How are they started? What do you do with them?

A. Well, we first catch them in our corrals in town. I mean by that, that the Kaibab Trail is something like three and one-half miles east of the village where our pack trains are. We first ship these mules into the village, where we catch them up and name them, tie them all up and more or less learn them to lead, be halter-broken, in other words; and from there they are taken to the pack train.

(Testimony of John Davis Bradley.)

We always, when we have that many at one time to break, we have several men to work with them.

In that course of work they are first usually taken down the trail with nothing more on them than just the pack saddle, without anything tied to it whatsoever, unless it might be a piece of canvas or something that would flop around, no weight. Then they are worked in that manner until they have built their muscles up to the point where they can make the trail. Sometimes they only go down in that first trip. By that time they have begun to tremble, you know, and they are left over until the following day and brought up again. That is repeated until these particular animals can negotiate the trip down and back. Then we [257] start putting weight on them, which is usually started light because this animal has always got to built his strength up to the job, the same as a person would going into any strenuous work. We built this weight up to the point where the animal can go down and back in a day's time, carrying the approximate weight of a man, which our weight limits are around 200 pounds, and we never pack over that. And so, whenever he can pack that weight or up to that, the guides or packers, that is, they are sometimes guides put out on that work, they start riding them.

Now, they will sometimes ride this animal, they will take him to the ranch, packed. Ordinarily they will saddle him, his first ride to the saddle

(Testimony of John Davis Bradley.)

there at Phantom Ranch. Then he will ride him half way out, then change their saddle to another animal and ride him the rest of the distance. They go through with that until the animal has gotten to where the packer or guide can properly handle him, handle his other pack mules, and then he will start riding him from the job and ride him down and back, or that is up to the individual packer or guide, whichever he sees fit. He is usually sixth in a one-man string, after they are broken to the point that he can handle them. Six is a man's string in a pack train. Then he will take this string of mules and alternate, riding and packing them, until he has any individual one or more in his string that he determines a guide can handle himself with a party safely, that is, so the guide can handle him to the point that he is not endangering the party.

At that time we bring this animal into the village, put him in our barns with the other mules, and a guide is assigned to him to ride him. Then at times, to get them used to different people, the guides will all switch mules; that is by orders usually from myself. As mules and horses, as you may know, some of them are inclined to be a one-man animal if handled by one man too long, therefore, that is the procedure that all of these animals go through. They are not handled too long by any one individual of our employees.

Q. After they have been ridden by the guide for sometime when is it decided whether they go into the dude string or not and who decides that?

(Testimony of John Davis Bradley.)

A. Well, the guides that is riding them as a guide mule; and, of course, during that time, as the people all carry slickers on their saddles, so does the guide, and during the time he is riding him he is instructed to use his slicker when necessary, and a lot of times when not necessary, to get this animal used to the same. Then when he thinks that, in our terms, the mule is foolproof, why, he usually tells me that the mule is ready to pack a guest. Then the usual routine that is gone through on that, the [259] guide will ride this mule, say, on the one-day trip to the river, but on the way back, in accordance if he notices some particular rider in his party that he thinks is quite capable, he will talk to him and ask him if he or she would care to ride this particular mule; and if they care to do so—that is usually a lady, if possible, because the ladies usually are always in the front of the party—then the guide will put this particular lady on the mule and put her directly behind him, where, if she should need any attention whatsoever, he is there immediately to help her.

The mule is worked in that manner until the guide and myself is absolutely assured that the mule is ready to take his place in the string, which means that from that time he will work in any position that he might be loaded out of the corral in. That does not have any particular place in the string.

Q. Do your mules afterwards have any particular place in the string or are they put anywhere you happen to put them?

(Testimony of John Davis Bradley.)

A. They have no particular place in the string. I might add that the only way that that can be decided is, of course, that if a small child is loaded on one of them or a lady or some lady that is particularly scared or that we think might have the tendency to get faint on the trip, if she is put on any one of the individual mules, he is put next [260] to the guide or as close as possible. We try to load them out in accordance to what we think the people need most attention and in accordance with what they are mounted on.

Q. Insofar as Chiggers is concerned have you ridden him personally or had you prior to 1942?

A. I have. At the time Chiggers came to the Canyon, at the time that car of mules came to the Canyon, I personally went to the pack train and assisted the packers in starting that car of mules.

Q. Did you have anything to do with Chiggers in that following two years, also, up to 1940?

A. Yes; all the time up to 1940; and, in fact, since he came there until the present.

Q. Did you ever ride him personally?

A. I have ridden him many times; yes, sir.

Q. In your handling of him, say, up to 1942, what did you see about the mule at all as far as his conduct is concerned when you had him?

Mr. Lincoln: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Schell: You may answer. Did you get the question?

(Testimony of John Davis Bradley.)

The Witness: May I have it again, please?

Mr. Schell: Will you please read it? [261]

The Court: Will you read it please, Mr. Reporter?

(Question read by the reporter.)

A. This mule Chiggers has a very decidedly gentle conduct. He has been that way ever since he arrived in that car of mules. That does not imply that he is the only one, because we have many of such mules out of 127 that we have at this time.

Q. In other words, some are exceedingly gentle and affectionate, so to speak?

A. That is right. We find that quite often in the disposition of mules, as well as you find some of them that are very wild, still you find a good many of them that are very affectionate and gentle. He happened to be one of this type of mules, which anyone knows those mules usually take shorter training than the wilder ones, naturally.

The Court: How old are the mules, usually, when you put them into service?

The Witness: From three—I would say from three to eight years old.

The Court: How long would you work them in the service, about how many years?

The Witness: That depends entirely on the way the individual animal stands up to the work, sir. I would say an average of 15 years.

The Court: An average of 15 years? [262]

The Witness: An average of 15 years; yes.

Q. (By Mr. Schell): By the way, are all these mules that go on the trail shod? A. They are.

(Testimony of John Davis Bradley.)

Q. What kind of shoes do they have on them?

A. They wear what we call a smooth shoe, just cold shoe that has to be worked by the forge. Of course, it is not the light cowboy shoe that can be worked cold. It is a forged shoe. It is smooth, without any corrugations on it whatsoever. It is just a flat, smooth shoe, steel.

Q. In taking these mules up and down the Canyon do they make a noise or not as they walk along?

A. Yes, sir. We have a party of, say, five to maybe the full party of 10, and the trail, naturally, is all rock. Then every pace of those steel shoes, along with the clatter of the hooves and the saddles creaking make considerable noise; yes.

Q. Can you plainly hear the conversation in back of you?

Mr. Lincoln: I object to that as being a conclusion of the witness, no proper foundation.

The Court: Sustained.

Q. (By Mr. Schell): How many times have you been down on that trail with parties yourself?

A. I wished I knew. I served the three [263] years from 1933 until '36 continuously as a trail guide, myself.

Q. Since that time have you gone down with parties from time to time? A. Yes.

Q. Based upon your experience in that work, will you tell us whether or not it is possible to hear conversations as the pack train is proceeding back of you?

(Testimony of John Davis Bradley.)

A. Might I explain this in this manner: As my routine as a guide, due to the fact that beyond the first person behind you, without very strict attention, even, to them, it is very hard to hear and understand, either them to understand you or you them while riding along. Therefore it was my custom to ask people, if they had any questions, if they would please ask them in the rest stops so that they would have a better chance to be understood and I would also have a better chance to answer their questions.

Q. Did you at my request—by the way, are pictures generally taken of the trip as it starts down into the Canyon?

A. There is a picture taken of all trips, the parties individually, that go into the Canyon on the Bright Angel Trail.

Q. Where are those pictures taken?

A. At Kolb Brothers' Studio, about 200 [264] yards, I would say, below the corral.

Q. And what else is done there at that place, if anything?

A. At the time the party is stopped for pictures to be taken, the guides are to instruct their parties as to the safety rules that we try to carry out.

Q. Are the cinches checked anywhere along the line?

A. About a quarter of a mile farther on down there is a particular stop made for that purpose.

Q. What is the reason for that?

A. Well, from the first saddling of these mules of a morning, I might say that the first thing they

learn is to throw pressure against those cinches so that they might not be too tight, I suppose. At any rate, they are cinched; that makes the fourth time before they are completely cinched up, that is, after they have traveled this short distance they relax to the point that they can be cinched where the saddle will not turn. [265]

* * * * *

The Court: In view of the plaintiff's statement that he does not wish the case to be submitted on the question of negligence do you desire to offer proposed instructions on the question of warranty, Mr. Schell?

Mr. Schell: I do not remember what instructions I had.

The Court: The instructions that you have, as I recall them—I do not have them before me at this moment—deal with the case on the basis of the theory of negligence only.

Mr. Schell: I assume I would want to make some. I do not know what your Honor's final opinion on the matter is as to just what theory that it will be submitted on. But my warranty instructions that I would offer, of course, would be along the lines of my contentions in here that the warranty is one on the exercise of due care in the selection of the animal for that purpose.

The Court: If you desire to submit further proposed instructions, you may do so, and that applies to both sides, in view of our discussion today, and I will submit the case to the jury on the question of warranty.

Mr. Schell: Implied and express, both?

The Court: If the jury finds that there [266-1] is an express warranty, I will instruct them on the subject of both express and implied warranty, and, of course, if they find either or both to predicate a verdict on.

You Submitted, Mr. Lincoln, some special interrogatories.

Mr. Lincoln: Yes, sir; I did.

The Court: You have seen those?

Mr. Schell: Yes. I think we filed objection to the form that they were in.

The Court: I would suggest that if you wish to have special interrogatories submitted in view of the fact that the case is to be submitted as an action for breach of warranty, that you may propose special interrogatories and I will consider them if you so desire.

Mr. Schell: I am not quite as familiar with the Federal practice as with the State practice. But I take it, in view of the fact that the court has made the statement, if we do give instructions upon the fact of implied and express warranty, we do not thereby waive our contention that it is not applicable to the case at this time, I take it?

The Court: No. Well, you would not want the requested instructions, I take it, if you did not think it was the law applicable to the case. Of course, you would not waive your motion to dismiss or your objection to the state of the evidence.

Mr. Schell: No. In other words, at [266-2] times I have submitted an instruction along this line: That we do not believe, we will say, just for example, the doctrine of *res ipsa loquitur* applicable. However, in the event the court should instruct upon the doctrines of *res ipsa loquitur*, then we request the court so and so.

The Court: Oh, yes; you may make that reservation, certainly.

Mr. Schell: In other words, we did not want to be confronted that we have waived the point.

The Court: No. I thought you meant whether you would be bound by the requested instruction as embodying the law.

Mr. Schell: Oh, no.

The Court: Yes; you may submit any instructions you desire, so long as you are willing to concede yourself that those instructions embody the correct statement of the principles of law. You may reserve the contention that they are not applicable to this case.

Mr. Schell: Yes. That is what I mean, because we so frequently do that.

The Court: Yes.

Mr. Schell: Not so frequently, but occasionally do that, saying we do not believe a certain warranty is applicable, and *res ipsa* or something else.

The Court: But if it is, then it should be given as a correct statement of law. [266-3]

* * * * *

Los Angeles, California, Thursday, October 2, 1947
10:00 A.M.

The Court: Is it stipulated, gentlemen, that the jurors are all in their places?

Mr. Lincoln: Yes, sir.

Mr. Schell: So stipulated.

The Court: You may proceed.

Mr. Schell: I wonder if I could have the last question and answer?

JOHN DAVIS BRADLEY

Recalled.

Direct Examination

(Resumed)

By Mr. Schell:

(Record read by the reporter.)

Q. Mr. Bradley, in the place when the mule is in the string, when they start down is there any order because of the mule itself after they have once gotten into the dude string?

A. No order whatsoever.

Q. Insofar as the mule is concerned?

A. Yes; so far as the mule. Yes.

Q. Based upon the passenger that is on the mule? A. That is true.

Q. Do you know whether or not this mule Chiggers [268] had been in various places in the string, of your own knowledge?

A. I do; yes.

Q. And tell us what you had noticed about that, all prior to 1942.

(Testimony of John Davis Bradley.)

Mr. Lincoln: We would object to that as entirely immaterial.

The Court: Overruled. You may answer.

A. Well, of course, depending on the passenger he was carrying, as I said before. If he was mounted by a lady, he was put up somewhere in the order of first of the string; if mounted by a man, he was always on the latter end of the string. Now, that can be from the first man in the party on back to the last. And through a series of trips he would naturally be in all of those different positions, as very often—and always, rather, they left the corral just as the guides lead them out, in no particular order whatsoever, which naturally puts them sometimes at the end and sometimes in various places in the string.

Q. Did you check the photographer's or have checked down at the photographer's, at the Kolbs' there to see whether or not you could find any pictures which would show this particular mule on rides during the years of 1940-41? [269]

A. Yes, sir.

Q. Did you find some? A. I did; yes.

Mr. Schell: May I approach the witness with these?

Q. I hand you here a series of pictures. I notice on some of them there are merely slips of paper. Did you put those on there? A. I did.

Q. What do those slips of paper indicate?

A. That shows this particular mule Chiggers in these different parties and the order in which he is in the party.

(Testimony of John Davis Bradley.)

Q. In other words, you have written on the top one "3rd mule with the girl rider." Does that identify which is Chiggers?

A. That is true, starting from the guide's mule.

Q. The guide's mule would be No. 1?

A. That is true.

Q. And so on down the line, is that correct?

A. Yes, sir.

Q. And do these pictures accurately represent what they purport to represent here on the film?

Mr. Lincoln: I respectfully submit, your Honor, that would be a conclusion of the witness, unless the witness can testify that he was present each one of the times that [270] a particular photograph was taken, as I understand from the evidence he has already given.

The Court: Sustained.

Q. (By Mr. Schell): You recognize the scenes in the pictures, do you? A. Yes, sir.

Q. Are all of these pictures taken in the same general locality?

A. They are all taken in exactly the same place.

The Court: Do you recognize the mule?

The Witness: Yes, sir.

Mr. Schell: We offer these pictures into evidence, if the Court please.

Mr. Lincoln: We object to them as irrelevant, incompetent and immaterial, no proper foundation for it, and particularly desire to call your Honor's attention to the fact, which I believe to be a fact, that on each one of the pictures is a designation

(Testimony of John Davis Bradley.)

of a date. The majority of the dates there are in 1940 and '41. I think there is only one date, if my memory serves me, which is in 1942. And we will respectfully contend in that regard that photographs taken of this particular mule in 1940 and 1941 would not be material insofar as this issue is concerned.

The Court: Is there an objection that no foundation has been laid as to the dates? [271]

Mr. Lincoln: No, sir; there is not, because I would like to examine this gentleman upon that particular question before, perhaps, your Honor decides upon whether they should be introduced or not.

The Court: You may inquire.

Q. (By Mr. Lincoln): Mr. Bradley, I notice upon—I think it is the lower left-hand corner of each one of those pictures—is a date, some of the dates in 1940, some in 1941 and, I think, one in 1942. Can you tell me whether or not those are the dates on which those particular pictures were taken?

A. It is; yes.

Mr. Lincoln: Then I respectfully submit, your Honor, that my objection is good.

The Court: Objection overruled. How many photographs are there?

Mr. Schell: I am just counting them now. 14. There are some here without any slips on and I think the witness will have to identify Chiggers in these particular pictures. We had them out and there is no particular identification on which is the mule.

(Testimony of John Davis Bradley.)

The Court: You are offering the ones that have slips identifying them?

Mr. Schell: Yes. We are offering them, I think, all in a group, but I think we would have to have him identify [272] the pictures where there is no slip attached as to which mule it is. I think possibly the best way would be to draw an arrow on the picture to the mule.

The Court: Very well. You may withdraw your offer at this time until you complete your examination with respect to them.

Mr. Schell: Does the court have a pen?

The Court: Do you wish to hand it to the witness and have him identify the mule?

Mr. Schell: Yes. I just wanted to see whether this would work and make an imprint.

Q. Will you draw just an arrow to the particular mule which is Chiggers as represented in these pictures?

(Witness marking on photographs.)

Q. On this one it is not necessary. There is only one mule on it and that is Chiggers, is it, this one?

A. That is him; yes.

The Court: What would be the purpose of that photo?

Mr. Schell: Well, just to give a picture of the mule. In the others he is all in a group and sometimes you only see a little part of him, and it would take somebody that knows the mule to recognize him.

(Testimony of John Davis Bradley.)

The Court: Do you wish them all marked as one exhibit?

Mr. Schell: Yes, if the court please.

The Court: They will be received into evidence. Are [273] they arranged all in order?

Mr. Schell: By way of dates?

The Court: Yes.

Mr. Schell: I can. However——

The Court: I do not think it is necessary unless you desire to.

Mr. Schell: No; I don't think it is necessary.

The Court: You may hand them to the clerk. They will be received into evidence and marked Defendant's Exhibit——

The Clerk: I, your Honor.

The Court: I. They will be marked I-1, -2, consecutively. How many are there all told?

Mr. Schell: I beg your pardon?

The Court: How many are there?

Mr. Schell: I think it was 14.

The Clerk: I count 14.

The Court: Then they will be marked I-1 to -14, inclusive.

Q. (By Mr. Schell): Do you know Mr. Mateas?

A. Yes, sir.

Q. By the way, did you mount Mr. Mateas on the morning of June the 17th? A. Yes, sir.

Q. On what mule did you mount him?

A. I mounted him on Chiggers. [274]

Q. Did you give any instructions to him how to hold the reins or anything of that character?

A. Yes, sir.

(Testimony of John Davis Bradley.)

Q. State whether or not that is standard practice? A. That is standard practice.

Q. And why?

A. Well, the people will be sure and understand this, as each guide is instructed to give the individual those instructions, as well as in a group after the guide has them in his charge.

Q. I mean what is the purpose of having them hold the reins?

A. Well, that is so that they might have some control, at least, over the animal should they need it. For instance, if a little rock or a lizard or something should roll down under one unexpectedly, why, he might give a little jump, you know, and, at the same time, he might stumble, which, if you have ahold of the reins, it has a tendency to help the animal up, to help him regain his feet; and, at the same time, to keep them from stopping along the trail and grabbing at the bushes or grass, which would have a tendency to allow them to look behind, which is our biggest safety rule, is to keep these groups in close order.

Q. Did you go down to the place where Mr. Mateas [275] was, later? A. I did; yes.

Q. And did you help bring him up to the hospital? A. Yes, sir.

Q. Are you familiar with the place where the accident occurred? A. I am.

Q. Where you found Mr. Mateas?

A. Yes, sir.

Q. Did you personally take any photographs of that location. A. Yes, sir.

(Testimony of John Davis Bradley.)

Q. I show you here three photographs and ask you if these are photographs you took?

A. Those are the pictures I taken; yes.

Q. The first picture I show you here, which is marked on the back No. G——

The Court: Exhibit G for identification.

Q. (By Mr. Schell): ——Exhibit G for identification, and ask you what that depicts?

A. Why, that shows the trail in general at this particular spot. Of course, the spot is not marked on the picture identically where Mr. Mateas hit the ground, but it shows that place clearly.

Q. And which way is that looking, towards the river [276] or uphill, this G?

A. From the back of the picture is looking up the hill, to the back of the picture. In other words, the lower part of the picture is towards the river.

The Court: Your camera was pointed uphill, was it?

The Witness: Yes.

Q. (By Mr. Schell): I show you Exhibit F and ask you which that is?

A. That is the same location from a slightly different angle but taken in the same direction.

Q. Taken in the opposite direction?

A. I beg your pardon. It is taken from the opposite direction. Yes; the camera is looking down the hill in this picture and up the hill in the second one.

Q. What is the third picture which is marked E or F? I can't tell whether that is F or E—E, I think.

(Testimony of John Davis Bradley.)

A. That is just a close-up picture of the ground in the immediate area that Mr. Mateas struck it.

Mr. Schell: We offer these as the defendant's next exhibits.

Mr. Lincoln: We object to them as immaterial.

The Court: Overruled. Defendant's Exhibits E, F, and G for identification are received into evidence.

The Clerk: So marked.

Q. (By Mr. Schell): About how far is this place where [277] these last pictures were taken from Indian Gardens?

A. About three miles below Indian Gardens.

Q. Towards the river from Indian Gardens?

A. Yes, sir.

Mr. Schell: We would like to exhibit these to the jury at this time, if the court please.

The Court: You may pass them to the jury.

Mr. Lincoln: All the photographs?

The Court: That is Exhibits E, F, G and I?

Mr. Schell: That is right. That is all.

Cross-Examination

By Mr. Lincoln:

Q. Mr. Bradley, if I understand you correctly, speaking about this mule Chiggers, he was a very affectionate sort of an animal, was he?

A. He was; yes.

Q. And how does he show that affectionate portion of his nature?

(Testimony of John Davis Bradley.)

A. Well, just in the manner of being entirely gentle, to the effect that you can walk up to him in the corral or any place that he might be standing without being tied and he is not easily excited.

Q. Is that the only way in which he showed that affectionate portion of his disposition? [278]

A. Well, that is about the only way they have to show such disposition.

Q. Mules differ in disposition the same as people, don't they, Mr. Bradley? A. Yes, sir.

Q. Take, for example, the 25 mules of which Chiggers was a portion, when they came there from Missouri and you first examined them you found different dispositions among the 25, did you?

A. Individually, yes.

Q. Do those different dispositions have any different trainings or do they all have the same general training which you have already described?

A. They have the same training, with the exceptions, of course, the gentler disposition takes less training.

The Court: By that you mean it takes less time to train them?

The Witness: Yes, sir.

Q. (By Mr. Lincoln): How wide a mule was this mule? By that I mean how wide across the back or across the rump, whichever way you make your measurements?

A. Well, I am sorry. I am afraid you have got me there. I never measured one across the back. He was——

(Testimony of John Davis Bradley.)

Q. Would you say he was two or three feet?

A. Oh, I would say two feet. [279]

Q. Two feet?

A. That is just a guess, of course.

Q. Yes. And how much did he weigh?

A. I would say around 950.

Q. How does that compare with other weights of the other animals in the string? Was it, as a general thing, lighter or heavier than the other mules?

A. An average.

Q. They run about the same size, do they?

A. Slightly below the average. That average is about a thousand pounds.

Q. You select that particular size of mule, I suppose, for this particular work, don't you?

A. That is the chosen size; yes.

Q. I think you said Bob Ennis, the boy, first went on the payroll in 1941; that is the Harvey Company payroll you are referring to?

A. Yes, sir.

Q. And what part of 1941 was that, that is, what month in 1941?

A. I am sorry I couldn't be accurate, but it would be immediately after his schooling was out, I believe, as he was going to school at that time and guided only through summer vacation.

Q. That would be probably June or July? [280]

A. Yes, sir; possibly June.

Q. Then he went back to school, did he, in that fall, that same year?

A. I believe he did, yes.

(Testimony of John Davis Bradley.)

Mr. Lincoln: I think that is all, Mr. Bradley, thank you.

The Court: You may step down, Mr. Bradley.

Juror Dorr: Your Honor, may I ask the witness a question?

The Court: Yes; you may, Mr. Dorr.

Juror Dorr: Mr. Bradley, was there an inflexible rule that guests could not change mounts on these expeditions?

The Witness: No, sir. That is purely up to the guide's judgment after he leaves the corral, as we do that quite often. At times we find that one person particularly is riding a mule, that that mule appears to be lazy and this person is scared and won't keep him up, and we have someone else in the party that is shown to be a better rider, and the mules differ in that, too. Some of them travel well of their own and others take advantage of their riders, more so. In those cases quite often we change riders after they leave the corral, along the trail, so they are better mounted and the party is easier to handle all the way through.

Juror Dorr: According to the judgment of the guide, [281] Mr. Bradley?

The Witness: Yes, sir.

Another Juror: Your Honor, may I ask?

The Court: You may.

The Juror: After this man went over the head of the mule what did the mule do at that time, at that particular instant?

(Testimony of John Davis Bradley.)

The Witness: Well, of course, I was not there, but I was told that he just walked a few feet and went to eating grass along the edge of the trail.

The Court: You are Mr. Tassell?

The Juror: Tassell.

The Court: Tassell. Any other questions?

Juror Pauly: Yes, your Honor.

The Court: Mr. Pauly.

Juror Pauly: There has been a lot of talking about the handling of the reins. It is my understanding it is always the standard practice at any time you ride a horse or mule to hold your reins up?

The Witness: Yes, sir.

Juror Pauly: And they are apt to drop their heads and be less alert, aren't they?

The Witness: That is right; and, at the same time, they can—those reins, if they stop to eat, those reins can slide down and get plumb off behind their ears and they [282] are likely to step a foot through them; and there are several different reasons.

Juror Pauly: That is what I mean; that is not just your rule, that is standard.

The Witness: Yes; that is a standard rule.

The Court: Mr. David?

Juror David: May I ask was this Chiggers' first trip on this particular trail down in 1942?

The Witness: That is his and all the mules in that particular party; yes.

Juror David: The first trip.

(Testimony of John Davis Bradley.)

The Court: Any further questions? You may step down, Mr. Bradley.

Mr. Lincoln: Just one question, if I may, your Honor.

The Court: Yes; you may.

Mr. Lincoln: One which was suggested by the remark of one of the jurors.

Q. Speaking about holding the reins, Mr. Bradley, does that mean to hold the reins up tight or does it simply mean that you hold the reins so they won't fall down?

A. That means to hold the reins so as not to pull on the animal's mouth but so that you have it there immediately in case you should have any occasion to pull him up for any reason. You have the reins in your hand, [283] not to hold them in any particular manner. As we tell the riders usually, if asked about them, to hold them in whatever manner is natural to them, just to hold onto the reins at all times.

Q. That means to simply hold the reins at all times and not hold them tight?

A. That is true.

The Court: By that do you mean it would be all right, under your instructions, for a rider to ride along holding the reins with his hand and have his hand leaning against the pommel of the saddle or horn of the saddle?

(Testimony of John Davis Bradley.)

The Witness: Any way that is more comfortable and natural to him, just so long as he holds onto the reins.

The Court: Just so they are in his hands?

The Witness: That is true.

The Court: Any further questions?

Mr. Schell: Yes, I might ask one question I think I overlooked, which was also suggested by a question.

Redirect Examination

By Mr. Schell:

Q. Mr. Bradley, in your experience with mules did you ever have any trouble when you first started the mules out after they had been in pasture during the winter?

Mr. Lincoln: Objected to as immaterial. [284]

The Court: Overruled.

Mr. Lincoln: No proper foundation, calling for matters which are not pertinent to this issue at all, not confined to this situation.

The Court: Overruled.

Mr. Schell: Do you have the question in mind?

A. I would like to a little better understand it, I believe, Mr. Schell. May I have it gain, please?

Q. Have you had experience previously with mules that had been off on pasture? I mean the mules that have been used before as dude mules and then you put them out to pasture, and then you put them back on service again; have you had that experience? A. Always.

(Testimony of John Davis Bradley.)

Q. And state whether or not you have had any difficulty with mules on their first trip?

A. We never have, sir.

Q. Were all these mules on this particular excursion mules that had been out to pasture for the winter?

A. Yes, sir.

Q. By the way, do you know the particular mule—I will show you a photograph here, and see if you recognize—may I have the plaintiff's exhibit, the photograph of the party?

The Court: Exhibit 4, I believe. Is it Exhibit 4?

Mr. Schell: Yes, sir.

Q. Do you recognize the mule that the guide was on?

A. Yes, sir; riding Bird.

Q. That is right; that is 4. Is that, or was that at that time, either, also known as a dude mule?

A. Yes, sir.

Q. And he carried dudes up and down prior to that particular trip?

A. Yes, sir.

Q. I mean in the previous years?

A. Yes.

Mr. Schell: That is all.

The Court: You may step down, Mr. Bradley.

Mr. Schell: Mr. Yarberry, will you come forward, please?

C. YARBERRY

called as a witness by defendant, being first sworn,
was examined and testified as follows:

The Clerk: What is your name, sir?

The Witness: Colonel Yarberry, C. Yarberry,
Y-a-r-b-e-r-r-y. [286]

Direct Examination

By Mr. Schell:

Q. Mr. Yarberry, where do you live?

A. Grand Canyon, Arizona.

Q. By whom are you employed?

A. Fred Harvey.

Q. How long have you been working for him?

A. 26 years the 25th of next month.

Q. What type of work do you do?

A. Well, I broke mules to pack, guide, feed
mules in the barn and everything.

Q. How many years' experience have you had
handling mules?

A. Ever since I was 10 years old.

Q. How old are you now?

A. I am 71 years old. I ran off from home when
I was 10 years old and I was making my own
living.

Q. In 1938 what were you doing for Fred
Harvey?

A. I was running the pack train.

Q. By running a pack train what do you mean
by that? Describe what a pack train is.

(Testimony of C. Yarberry.)

A. Well, a pack train is packing lumber, coal, grain, hay, gasoline, fuel oil, laundry down to the Phantom Ranch in the bottom of Grand Canyon.

Q. And what do you use to pack it down with?

A. Mules.

Q. Did you know a mule by the name of Chiggers?

A. Yes, sir; I shore do.

Q. By the way, do you know who selected that name?

A. Yes, sir, I did.

Q. How did you happen to call him that?

A. I had a little pet horse down in Texas. He was so quiet and nice and gentle that I always wanted to name a mule Chiggers, and I never did get the chance to pick out the right kind of a mule to name Chiggers until this little old mule come along. So, when I walked in the corral and stood there and looked at him a while, and walked up to him and put my hand on his neck, I said, "I will call you 'Chiggers'."

Q. And that was that?

A. And that was that. That is the way the name—how I got the name.

Q. Did you use Chiggers in 1938 in the pack string?

A. Yes, sir.

Q. Tell us a little bit how you used him, what you did with him to break him?

A. Well, we broke him to lead, put a pack saddle on him and run him up and down the trail there so his muscles got solid or stout, you know, and his wind got good. You could catch him anywhere on the trail you wanted to. So there was four of us

(Testimony of C. Yarberry.)

packing. Each one of us had [288] a canteen, and I snapped my canteen on, mine on one side and the other boy would snap his canteen on the other side. The regular rings of a pack saddle are about this far apart——

Q. About six or seven inches apart and about three or four in diameter?

A. That's right. Whenever we wanted a drink, all we had to do was just to stop the mules and go back. Chiggers would just stand there, we unsnap the canteen and take a drink.

Q. Then after he got hardened did he carry loads?

A. Yes, sir. He carried hay, he carried grain, he carried chuck.

Q. What is chuck, food? A. Yes, sir.

Q. What do you do to see whether or not they shy or are gentle, and so forth?

A. Well, tie tarps on them and ride them with slickers. Maybe you will be trotting down along the trail, you know, when you put him first on the trail and first start packing him. They are drove, you see, until they get used to, you know, carrying a load downhill, otherwise they will get like a hyrdophobia dog; they will get sick traveling by himself, you know, see. Often he has got his head down and walking along, and sometimes the pack turns under his [289] belly before you get to him. You can't cinch a young mule up tight. If you do cinch him up too tight, he will get tender and sore under the cinch and then when you go to cinch him up again,

(Testimony of C. Yarberry.)

you can't cinch him tighter. After you cinch him up first, the saddle is loose—this is a pack saddle I am talking about, see—and gradually you keep cinching him tighter and tighter and tighter, and the first thing you know, why, you are tough all under here, you know, you see, and in the tenderness here. And sometimes the pack turns and they get a load under his belly. Maybe he will kick and bite, or up and just stop, you see, and you have to get off and take the load out from under his belly and cinch him tighter.

Q. How did Chiggers behave in connection with his training? Was he hard to train or otherwise?

A. Well, Chiggers, about the first day I seen him is just like he is today, just the same Chiggers, just as gentle. He didn't care for nothing, you know. He was like a Supai Indian. Time means nothing to Chiggers.

Q. Then how long did you use him in your string?

A. Well, I packed him all that fall and then he was shipped off to pasture, and then he come back in the spring and we packed him all that spring and rode him, and then a guide taken him and we went to riding him in the dudes' string. [290]

Q. Did you ride him during the time you had him in your pack train?

A. Yes, sir; both fall and spring, too, and summer. Yes, sir.

Q. Now, in 1940 and '41 did you do any guiding?

A. Yes. I was a guide, I think, in '41. I don't know just how much, but I think I was.

(Testimony of C. Yarberry.)

Q. In other words, sometimes you would guide when there were shortages? A. Yes, sir.

Q. Or a good many parties, is that right?

A. Yes, sir.

Q. Did you ever have Chiggers in your string during that time?

A. Yes, sir; I had him a number of times. I wouldn't know how many times, but I have had him in the string.

Q. Did you ever have any trouble with him during that time?

A. No; I never did. No, sir.

Mr. Schell: That is all.

Mr. Lincoln: No questions.

The Court: You may step down, Mr. Yarberry.

The Witness: Thank you.

Mr. Schell: Bob Ennis. [291]

ROBERT E. ENNIS

called as a witness by defendant, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Robert E. Ennis.

Direct Examination

By Mr. Schell:

Q. Will you please keep your voice up?

A. Yes, sir.

Q. Where do you live at the present time?

A. At the present time I am stationed at Langley Field, Virginia.

(Testimony of Robert E. Ennis.)

Q. And what is your occupation now?

A. I am in the United States Air Force, pilot.

Q. How old are you now? A. I am 23.

Q. During your early life where did you live?

A. I lived at Grand Canyon, Arizona.

Q. Where your parents there?

A. They were.

Q. Have you had experience in going up and down the various trails leading from the rims of the Canyon down to the bottom?

A. Yes, sir. Just about as long or as far back as [292] I can remember I have been riding down into the Grand Canyon.

Q. Did you from time to time work as a guide?

A. Yes, sir; during my summer vacations from school.

Q. When did you first start taking parties down?

A. You mean on the payroll? I started on the payroll in 1941.

Q. Before you went on the payroll had you been down with parties? A. Yes, sir.

Q. In 1941 where did you work mostly?

A. Most of the summer I was on the north rim.

Q. And where the El Tovar is, that is on the south rim, is it? A. Yes, sir.

Q. Had you ever known a mule known as Chiggers before June 17, 1942? A. Yes, sir.

Q. Had you ever personally used him as a mule in a string before that?

A. No, sir; I don't believe I ever did before that time.

(Testimony of Robert E. Ennis.)

Q. Had you seen him being used?

A. Yes, sir.

Q. Before 1942? [293] A. Yes, sir.

Q. And where had you seen him?

A. Well, sir, our north rim trip, the two-day trip, meets at Phantom Ranch the same as the two-day trip from the south rim; and I have seen him down there a number of times, and also when I went to the south rim I have seen him quite a few times.

Q. On the particular day in question, June 17th, did you start down with a party? A. Yes, sir.

Q. Do you remember Mr. Mateas being in that party? A. Yes, sir.

Q. Do you know what mule you were riding?

A. I was riding Bird.

Q. Was that a mule that had been in the pack string before, or the dude string, I mean?

A. Yes, sir.

Q. About what time, if you remember, did you start from the top?

A. It was about 11:00 o'clock.

Q. And your destination was Phantom Ranch that night? A. Yes, sir.

Q. Now, going down the trail after you started from the corral where was your first stop?

A. The first stop was the Kolb Studio, approximately [294] 200 yards down the trail, where the picture was taken.

Q. Did you give any instructions to your party?

A. Yes, sir.

Q. What were those instructions?

(Testimony of Robert E. Ennis.)

A. Well, sir, as soon as the picture was taken I ride around the switch-back where all in the party can see me and I can see all of them, and I tell them my name, and I would try to make it a pleasant trip for them. There was four things that I always asked my people to do, was to always hold the reins, to always keep their feet in the stirrups, try to keep their mules as close to each other as they could, and to not get on or off of their mules unless I was there to help them.

Q. Did you give such instructions to this particular party? A. Yes, sir.

Q. What was your next stop?

A. Approximately a half a mile down the trail we stopped to cinch up the mules and make a final check of all the cinches and see that the saddles were setting right.

Q. Did you do that on this date?

A. Yes, sir.

Q. Up to that time had you had any complaint by Mr. Mateas or anybody about the actions of Chiggers? [295] A. No, sir.

Q. Going down that trail are there switch-backs or is it all a straight trail?

A. There are switch-backs. There is quite a number of switch-backs.

Q. What, if anything, did you do on this day to check your party as you went down?

A. Well, I would say a good half of the time I am riding, turning back towards where I can see the party, and when I am not doing that, I am on

(Testimony of Robert E. Ennis.)

the switch-back to where they are always right in front of me as they are coming down. I can always see them.

Q. During the way down did you see the party as a whole? A. Yes, sir.

Q. Did you observe Chiggers along with the other mules? A. Yes, sir.

Q. Did you notice anything unusual about his conduct? A. No, sir.

Q. Where was your next stop?

A. We stopped at Indian Gardens, four and one-half miles down, where we ate.

Q. From the time you left the corral until you got to Indian Gardens did you hear anybody making any complaint [296] about the manners of Chiggers?

A. No, sir.

Q. Did you see anything unusual about his actions? A. No, sir; I didn't.

Q. Then what did you do at Indian Gardens?

A. We stayed there approximately an hour, ate our lunch.

Q. Where do you eat lunch there? Where did you at that time?

A. Right beside the trail just as you come into the Gardens there is tables there, where we ate our lunch right by a water fountain.

Q. Were the whole party seated there?

A. Yes; it was.

Q. Did you hear any conversation at that time with reference to Chiggers?

(Testimony of Robert E. Ennis.)

A. Well, sir, we had quite a bit of conversation about the mules at the Canyon. I can't remember just what was said about any one particular thing.

Q. Was any complaint made to you or request to change mules? A. No, sir——

Mr. Lincoln: Objected to as being a conclusion of the witness.

The Court: Sustained, unless restricted. [297]

Q. (By Mr. Schell): Do you remember anything being said to you with reference to a request for a change of mules by any member of the party?

Mr. Lincoln: Objected to as already having been answered in a different form.

The Court: Overruled, overruled.

The Witness: Do I answer?

The Court: You may answer.

The Witness: Would you read that, please?

The Court: Please read it, Mr. Reporter.

(Question read by the reporter.)

A. No, sir.

Q. (By Mr. Schell): Was this mule that you were riding a gentle mule?

A. Yes, sir.

Q. Assuming a complaint had been made to you or called to your attention that someone was having trouble with the mules what would your practice be?

Mr. Lincoln: Objected to as argumentative, incompetent and immaterial.

The Court: Sustained.

Q. (By Mr. Schell): Were you informed by anyone at the time at Indian Gardens or anywhere

(Testimony of Robert E. Ennis.)

in that general vicinity, up to that time that there had been any trouble with the mule Chiggers? [298]

A. No, sir.

Mr. Lincoln: Objected to as already answered in another form.

The Court: Overruled. The answer may stand.

Q. (By Mr. Schell): What did you do at Indian Gardens?

A. After we ate lunch I went and cinched up all the mules and checked the saddles, untied the mules, then loaded the people on, and from there we went around approximately 30 feet to the water trough where we watered our mules.

Q. Do you remember wherether or not the people were mounted on different mules?

A. No, sir; I do not.

Q. Does that sometimes happen?

A. Yes, sir. I would say that approximately once, and usually twice, in a day when we take a party down we have to change somebody back from a mule when they will accidentally get on a wrong one. That is just an ordinary occurrence.

Q. Such a thing may have occurred and you do not remember it, is that right?

A. Yes, sir. That is one of the reasons I ask my people to remain off their mules until I get there to help them on. Besides wasting the time, they always have the chance of getting on the wrong mule and it will step out [299] from underneath them.

(Testimony of Robert E. Ennis.)

Mr. Lincoln: I ask the testimony beginning "That is one of the reasons" be stricken out as not responsive to the question, a voluntary statement of the witness.

The Court: The motion will be granted.

Mr. Lincoln: And the jury be instructed to disregard it.

The Court: The jury are instructed to disregard it.

Q. (By Mr. Schell): After you left the watering trough where did you go?

A. Headed down the trail towards the river.

Q. As you were going down were there some more switch-backs in there? A. Yes, sir.

Q. What, if anything, did you observe about the mules, and particularly Chiggers, from that time on? A. I observed nothing out of the way.

Q. State whether or not mules sometimes have a tendency to crowd up pretty close to one another.

Mr. Lincoln: Objected to as argumentative.

The Court: Overruled.

A. Well, sir, we like to have our mules stay just as close as they can; and there are some mules that are good travelers, that will put their heads right up behind other mules' rear ends and sometimes just kind of walk [300] right along with them. Sometimes they will do it for a switch-back or two, and sometimes they will do it longer.

Q. (By Mr. Schell): Did you see Mr. Mateas fall off the mule or get off the mule in some way or other on the way down to the river?

A. Yes, sir; I did.

(Testimony of Robert E. Ennis.)

Q. What did you see in that respect?

A. The first I noticed, Mr. Mateas was in the air kind of as if he was making a dive, going right over the mule's head.

Q. What did you observe about the mule?

A. I couldn't see the mule.

Q. What did you do when you saw that?

A. As soon as I saw it, I jumped off my mule and ran back to Mr. Mateas.

Q. About how far was that place where that occurred?

A. That is approximately a half a mile from the river.

Q. About how far is it from Indian Gardens to the river?

A. It is three and one-half miles.

Q. And this was about three miles from Indian Gardens?

A. Yes, sir.

Q. At that point is that trail steep or is it comparatively level?[301]

A. It is comparatively level. You are following the contours of the creek.

Q. After you went back to Mr. Mateas where did you find him?

A. He was lying just at the side of the trail in a catclaw bush.

Q. What is a catclaw bush?

A. Well, it is a bush that has claws, kind of like a cat. I am not sure of the real name of it, but that is what it is known as there; kind of like a rosebush except it does not have the pretty flowers.

(Testimony of Robert E. Ennis.)

Q. And what did you do for Mr. Mateas at that time?

A. Well, I asked him what was the trouble, and he wouldn't talk to me or couldn't talk. I Asked him if he could move and he said he couldn't and wouldn't. And by that time there was another gentleman came back to help me out.

Q. What did you do for him?

A. Well, Mrs. Mateas wanted to come back, so I went up and helped her off her mule and, while I was there, I got my first-aid kit and brought it back through the mules so she wouldn't get kicked. At that time I untied two slickers out of the saddle and made a pillow out of one of them and covered this bush up with the other one so he would be in the shade. [302]

Q. Then what did you do?

A. Well, we tried to get more questions out of him: Where he hurt, what seemed to be the trouble, and he still could not move and wouldn't. And he was in pain, all right. The way he would talk, you could tell he was hurting.

It was decided then that, since we were out in the sun and it was quite hot, that I should take the rest of the party down the river, approximately half a mile down the trail. So I helped—I already had them on. We never did take the ladies off. I took the three remaining ladies, two or how many there was, down to the river.

Q. And then did you come back?

A. Yes; I did.

(Testimony of Robert E. Ennis.)

Q. During the time you were down in the Canyon did you ride Chiggers? A. Yes, sir.

Q. And where did you ride him to?

A. Sir, when I took the ladies down to the river, I called up John Bradley and told him I had had an accident; and while I was there I also talked to the doctor and told him what seemed to be the trouble. He told me to go back up and see if Mr. Mateas could have any feeling in his legs or anything. So I went back up and found out that he couldn't. So I got on Chiggers and rode back down to the river where the telephone was. [303]

Q. Then you rode back to Mr. Mateas later?

A. Yes, sir.

Q. After you had made your phone call?

A. After I had made the phone call.

Q. Then did you go back and stay with Mr. Mateas from then on?

A. No, sir. After I made the second phone call I went back to Mr. Mateas and told him that John Bradley and the doctor was on the way down and would be there as soon as possible. I had made arrangements to be met on the river trail which connected the Bright Angel Trail with the Kaibab Trail. So I went back down to the river and took the three ladies over to where I was met on the river trail, and they went on to the Phantom Ranch and I came back where Mr. Mateas was.

Mr. Schell: You may examine.

Mr. Lincoln: No questions. [304]

* * * * *

The Court: Does either side have any further requested instructions to submit?

Mr. Lincoln: I have nothing further.

Mr. Schell: I dictated some this morning, they are not in court but I will have some when I come back. I find it somewhat difficult to put my thoughts on paper. It was not quite as simple as I anticipated. I really did not anticipate it was simple, but I mean it was just as difficult as I anticipated. I have dictated them. I worked last night trying to outline them and this morning I dictated them and, of course, they probably have been done by now.

May I ask that all these witnesses be excused now so they may go?

Mr. Lincoln: As far as I am concerned, certainly.

The Court: All witnesses in this case are excused from further attendance.

We will meet at 1:30, then, gentlemen, and discuss the proposed instructions. Will you send me up a copy of your proposed instructions prior to 1:30?

Mr. Schell: Where shall they be taken?

The Court: To my secretary's office.

Mr. Schell: Yes; I will be glad to. I will check them over and if they are correct, I will send them right up; [317-1] and if they have to be changed, I will change them and send them up as quickly as I can.

The Court: If they would not arrive a half hour in advance of 1:30, there would not be any-

thing gained by that inconvenience; so you might as well bring them up with you.

Mr. Schell: I will endeavor to send them right up.

The Court: And, of course, serve counsel.

Mr. Schell: Yes.

Mr. Lincoln: Of course, your Honor may realize the predicament I may be in. I may want to ask your Honor for some additional ones to counteract or counterpart those which Mr. Schell presents.

Mr. Schell: I am in the same predicament.

The Court: I suppose we had better get the proposed instructions before attempting to discuss them. Do you wish the matter and does the plaintiff wish the case submitted to the jury on the question of both express and implied warranty?

Mr. Lincoln: It seems to me, your Honor, that that is the law of the case as settled, the law of this particular case.

The Court: As to both express and implied warranty. I am convinced that the law of California which covers here is to the effect that the implied warranty, the warranty implied by law from the mere contract of hiring, is that the [317-2] party hiring the animal has to use reasonable care to see that the animal is reasonably fit for the purpose for which it is hired. So I take it that both of you are agreed that this was a hiring of the mule?

Mr. Lincoln: I think that is true.

The Court: It is not the usual livery stable hiring of animals because of the control which the defendant had over the animal. My question is:

Does the plaintiff wish the case submitted on implied warranty alone or does the plaintiff contend that there was an express warranty made which was breached?

Mr. Lincoln: We cannot, your Honor, successfully contend that there was an express warranty as to this particular mule.

As to whether or not the phraseology in the advertisement, in the circular, that portion of the circular which your Honor read yesterday, creates an express warranty, I am free to confess I am somewhat in doubt myself. I think, without any question, it did create an implied warranty which we were entitled to rely upon.

The Court: The law raises the implied warranty, if nothing had been said.

Mr. Lincoln: Yes.

The Court: As I understand the law, if Mr. Mateas had gone up and said, "I want to go on that trip. Give me [317-3] two tickets." Had not seen a circular or anything else, just heard there was such a trip and that is all he knew about it, laid down his money, took the tickets and went out to the corral and got on the mule, the law would still raise the implied warranty, according to my understanding.

Mr. Lincoln: I think so.

The Court: Do you gentlemen agree?

Mr. Schell: I think so. That would be implied warranty that your Honor just outlined. [317-4]

* * * * *

Los Angeles, California,
Thursday, October 2, 1947, 1:30 P.M.

The Court: Is it stipulated, gentlemen, that the jury are absent?

Mr. Lincoln: Yes, sir.

Mr. Schell: So stipulated.

The Court: Have you seen the additional jury instructions requested by the defendant?

Mr. Lincoln: I received them, your Honor, just about 1:00 o'clock today; yes, sir. And I have prepared some objections which should be here most any moment, sir. My stenographer is working on them now, together with one or two additional instructions which I would respectfully ask your Honor to give in place of those which I am objecting to. These additional instructions are based upon the question of warranty which your Honor and I discussed previously today.

The Court: Do you gentlemen view this transaction a hiring of personal property?

Mr. Schell: Well, I would say that it was hiring or renting.

The Court: Well, that is the same thing, "hiring or renting."

Mr. Schell: Yes, or renting.

The Court: I suppose, popularly, today they call it [318] "leasing," do they not? Leasing has came to be used in applying to personal property as well as real property.

Is that the way you look at it, too?

Mr. Lincoln: It seems to me so; yes, sir. [318-1]

* * * * *

The Court: Is it stipulated, gentlemen, that the jury is absent?

Mr. Lincoln: Yes, sir.

Mr. Schell: So stipulated.

The Court: After reading that opinion several times, I do not believe that the Circuit Court intended to do any more than to hold that a case was made out to go to the jury on a theory of either negligence or breach of warranty or both.

I have tried my hand at formulating some instructions which not only meet the language of the California cases, [318-3] as I understand them, but also, I hope, the intelligence of the jury.

With all deference, I can say it seemed to me that if I made up a set of instructions which merely took the language of the California decisions, the jury would not know what I was talking about.

My secretary is about to finish them, and if you gentlemen could wait for probably 20 to 30 minutes, you could take a complete set home with you.

Mr. Lincoln: Thank you, sir.

The Court: You will have copies of each of them, and then let us all study them and meet tomorrow at 9:30 and deal with the objections and suggestions that you may have.

I will ask you to do this: In making your objections, of course, make any you wish for the record, but as far as making them for the purpose of this discussion, offer a constructive suggestion. In other words, if one word is wrong, let us have the definite suggestion as to what you think the word should be or how the instruction should be worded.

I want to present this issue, of course, fairly and squarely so the jury can decide according to the facts they find and the law.

Mr. Lincoln: Those last three proposed instructions which I have written in longhand I shall be able to present [318-4] to your Honor in type-writing tomorrow morning.

The Court: You won't need to do that.

Mr. Lincoln: I will be very glad to do it. It might be easier for your Honor to read. My handwriting is not as intelligible sometimes as the type-writing is.

The Court: I will be glad to read them.

Mr. Lincoln: Thank you.

The Court: Do you feel that special interrogatories should be submitted to the jury in this matter?

You do not need to answer that now. I would like to hear from both of you on it tomorrow morning. And if you do think it should be submitted on special interrogatories, you probably would wish to revise your requested interrogatories in the light of our discussion.

Mr. Lincoln: Yes, sir.

Mr. Schell: I might say this: That I do not know whether it should be part of the procedure to present special interrogatories, but at least I think possibly after I see the court's instructions, it might give me an idea of what to submit as special interrogatories.

The Court: Do you think they should be submitted in this case?

Mr. Schell: I do not know that it is essential, of course, but it might be of assistance to get them to see what the factual issues are. Then they have as much [318-5] difficulty applying the law even after the instructions as we have had.

The Court: Very well. [318-6]

* * * * *

Los Angeles, California,
Friday, October 3, 1947, 9:30 A.M.

The Court: Is it stipulated, gentlemen, that the jury are absent?

Mr. Lincoln: Yes, sir.

Mr. Schell: So stipulated.

The Court: I want to say at the outlet, Mr. Lincoln, that after reflection over night on this question of express warranty, I have come to the conclusion that express warranty here does not contain any greater content than the implied warranty; and I take it that is the doubt you had yesterday when you said you had trouble spelling anything out of that circular.

Mr. Lincoln: That is why I was waiting for your Honor's wiser suggestion.

(Further legal discussion omitted from transcript.)

The Court: That will, of course, necessitate the elimination entirely, as well as the modification, of some of the early instructions. It will eliminate entirely what are now numbered proposed instructions 21 and 22. When I refer to proposed instructions, now, I will say "court's instructions," instead

of “proposed instructions” to distinguish them from any instructions proposed by the parties. Eliminate 21 and 22.

Mr. Lincoln: While you are on that subject, may I also suggest, your Honor, that on No. 11——

The Court: We will take them up now *seriatim*.

Mr. Lincoln: Oh, pardon me.

The Court: Are there any suggestions or objections [320-1] with respect to the first nine of the court’s suggested instructions?

Of course, that includes not only the possibility of correcting those suggested by the court but also eliminating any that counsel deems non-essential.

Mr. Lincoln: Yes, sir.

Mr. Schell: I think I see nothing in the first nine.

The Court: Do you see anything in the first nine?

Mr. Lincoln: No, sir. In fact, I had no criticism of all of them. They were so much better than I had written or could write that I was anxious to accept them in their entirety.

The Court: Coming to the court’s numbered 10, I had noticed a suggested change, in the interests of clarity, and then also changed “warranties” to “warranty” in view of the elimination of the express warranty feature. So that instruction 10, as so amended, would read now:

“The plaintiff in this case claims damages for personal injuries alleged to have been suffered by him as a proximate result of claimed breach of the implied warranty”——

strike the "of" and insert "made by" "the defendant in connection with the hiring or letting * * *."

As so amended is that instruction satisfactory to both sides? [320-2]

Mr. Lincoln: To us.

The Court: I do not wish to foreclose either counsel. This question of law has been of so much difficulty, apparently, to counsel and to the court in this case that I want to say in connection with this discussion, that even though you approve tentatively the instructions, after you have heard them given, if you feel that any of them are erroneous, I am going to excuse the jury prior to the last instruction and give you an opportunity to make a record of your objections.

Does 10, as so amended, seem satisfactory?

Mr. Schell: Yes.

Mr. Lincoln: Yes, sir.

The Court: 11. I would strike the first subparagraph there, beginning "Specifically." It seems unnecessary in view of the elimination of the express warranty feature. And add, after "ordinary care" in line 18, the phrase "under the circumstances"; and in line 19, following the word "and" in the last clause, add the words "to see to it" "that the animal is fit and suitable for the purpose for which the mule is hired." So the last subparagraph will read:

"That is to say, one who rents or lets or hires an animal such as a mule for riding purposes is held by law impliedly to warrant to the rider that [320-3] the"—

I think "owner" would be better than "renter."

"the owner of the animal knew or had exercised ordinary care under the circumstances to ascertain the habits of the mule, and to see to it that the animal is fit and suitable for the purpose for which the mule is hired."

It seems to me that unless some language is added into that last clause it might be susceptible of the interpretation that there are no qualifications upon the warranty——

Mr. Schell: I had a suggestion in that one instruction I had.

The Court: As so amended, does that meet your objection?

Mr. Schell: No. This is my objection to 11: While we assume that the law of Arizona is the same as California for the purpose of the case, in the absence of any law in the cases or anything like that, nevertheless, I do not think that the law of California, as such, will provide particular statutes or apply to a renting in Arizona. While the court has a right to assume, in the absence of contrary evidence, or suggestion, rather, that the law is the same, my understanding is that the courts do take judicial notice of the laws of considered states. It used to be that you had to put them in evidence, but now they take judicial notice of them but, [320-4] of course, we have to call them to their attention.

The Court: Of course, I construe Section 1955 as not to impose—I do not think Section 1955 does any more than raise the implied warranty of reasonable fitness.

Mr. Schell: I thought it might be a little confusing. Mr. Delamer checked the Arizona Code. There is no similar section to 1955 in Arizona, and there is no similar subdivision of the heading of that. And he said he checked through all the indices, all on the personal property and also the digests, and found no reference to any similar section in Arizona.

The Court: If you object to the reference to the section, it seems to me that the last subparagraph of the instruction would state the law. That is taken from the Stanley case—isn't that one of the cases that is cited—Cal. App.? I do not have it here with me.

Mr. Schell: There is another case in 52——

The Court: The case that cites the Dan case?

Mr. Schell: 52 Cal. App. (2d), Kersten vs. Young—isn't it, or Young vs. Kersten?

Mr. Lincoln: That Con case?

The Court: Yes. This last subparagraph is a virtual paraphrase of the language, except I used "suitable" instead of "safe." The decision there uses the word "safe." [320-5]

Mr. Schell: I just thought I would call the court's attention to this section. It might be confusing to some of the jurors. They will say this thing happened in Arizona, and to apply the California law, without any further explanation.

The Court: I do not think it adds anything so far as the jury is concerned.

Mr. Schell: And Mr. Delamer did say that he made diligent search and found no similar section whatsoever.

The Court: What would you think of introducing the last paragraph and merely make the instruction 11 read as follows:

“One who rents or lets or hires an animal such as a mule for riding purposes is held by law impliedly to warrant to the rider that the owner of the animal had exercised ordinary care under the circumstances to ascertain the habits of the mule, and to see to it that the animal is fit and suitable for the purpose for which the mule is hired.”

Mr. Schell: From the standpoint of construction, I am wondering whether the words “and to see to it” after the word “and,” starting in line 19, goes back and ties in with the “ordinary care.”

The Court: I added those words in an attempt to tie it into “ordinary care.” I am open to suggestions on that.

Mr. Lincoln: Would not the second section of that [320-6] instruction, your Honor, be satisfactory if you should strike out line 10, which reads “Section 1955 of the Civil Code of California,” and add in the place of it the words “the law”; so that it would read:

“The law imposes upon persons who hire or let,” etc.

I think that is the rule, at any rate, of the common law, whether it is the rule of statute law or not, and if there was no such statute in Arizona, as Mr. Schell says—I believe Mr. Delamer, of

course, when he says he does not find it, because I cannot find it myself. Then the common law naturally goes into effect.

As I understand it, the rule which your Honor has suggested in lines 11 to 14 of that proposed instruction is a statement of the common law.

The Court: Well, how would this satisfy both of you, then?

“The law imposes upon persons who hire or let or rent personal property, such as a mule, the legal duty to put such property into a condition fit for the purpose for which it is let or rented or hired.

“That is to say, one who rents or lets or hires an animal such as a mule for riding purposes is held [320-7] by law impliedly to warrant to the rider that the owner of the animal had exercised ordinary care under the circumstances to see to it that the animal is fit and suitable for the purpose for which the mule is hired.”

It seems to me this talk about “ascertaining the habits and propensities” are just all involved in fitness and suitability.

Mr. Schell: I think that clarifies it a good deal.

Mr. Lincoln: We are satisfied.

The Court: Shall I read it again? Are you satisfied with that, Mr. Schell?

Mr. Schell: I think so; yes, sir.

The Court: I will read it again if you like.

Mr. Schell: No; that is all right. We will just need it typed, because I have messed mine up so I will just have to rewrite it.

The Court: All right. 12, then, I have modified to read thusly:

“In this case, then, the defendant impliedly warranted to the plaintiff that the defendant had exercised ordinary care under the circumstances”—I added “under the circumstances”—“to see to it that the mule ‘Chiggers’ was fit and suitable to be ridden by the plaintiff down [320-8] Bright Angel Trail; and further, that throughout the trip the defendant’s agents in charge of the party would continue to exercise ordinary care under the circumstances to see to it that the mule ‘Chiggers’ was fit and suitable to be ridden by the plaintiff.”

Did I go too fast for you to get those changes?

Mr. Schell: Yes, sir; I am afraid so.

The Court: After “ordinary care” in line 10 I added “under the circumstances.” In line 11, after “ridden” I struck “on the trip taken” and inserted after “by the plaintiff” the words “down Bright Angel Trail”—“and further, that throughout the trip the defendant’s agents”—instead of “guiding” I inserted “in charge of.” Instead of “were exercising,” “would continue to exercise ordinary care,” adding after that “under the circumstances to see to it that the mule ‘Chiggers’ was fit and suitable to be ridden by the plaintiff.”

Mr. Schell: In other words, then, after the semicolon it reads: “and further, that throughout the trip the defendant’s agents in charge of the party would exercise ordinary care”?

The Court: No, "would continue to exercise."

Mr. Lincoln: "were exercising and would continue"?

The Court: No; not "were exercising." I have stricken [320-9] "were exercising" and have inserted "would continue to exercise."

The warranty is made at the time he buys the ticket, isn't it? That is when the warranty was made. And as far as what transpired up to that time, it is past. The conditions then existing at the present and in the future, isn't it? I mean the tense must be future. What do you say to that now?

Mr. Schell: I think that is all right.

Mr. Lincoln: We are satisfied, your Honor.

The Court: Then I have changed what was marked "15" so 13 would become 15, the definition of "ordinary care."

"Ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs in order to avoid injury to themselves or to others."

That is numbered in your set as 15.

Mr. Lincoln: Yes, sir.

The Court: I have renumbered that "13." It seems to me it belongs here.

Mr. Schell: What happens to 13?

The Court: That will take care of itself as we go along, I believe. What is 13 now in your set?

Mr. Schell: "The mere fact that an accident happened"——

The Court: Oh, that comes later, yes. So 15 in your [320-10] set, the definition of "ordinary care" becomes 13. I take it there is no objection to that?

Mr. Schell: No, sir.

Mr. Lincoln: No, sir.

The Court: And 16, starting out: "Ordinary care is not an absolute term, but a relative one." That becomes 14. Then old 13 becomes 15 now:

"The mere fact that an accident happened, considered alone, does not support an inference that some party, or any party, to this action failed to exercise ordinary care."

I notice you suggested one with respect to breach of warranty which is practically the same instruction, Mr. Schell.

Mr. Schell: Yes.

The Court: Do you think this covers it?

Mr. Schell: Let's see. I do not happen to have mine.

The Court: I have it here. Instead of "failure to exercise ordinary care" I think your proposal was:

"The mere fact that an accident happened considered alone does not give rise to an inference that the defendant breached any warranty."

That is your proposed instruction No. A-1.

"The mere fact that an accident happened considered alone does not give rise to an inference [320-11] that the defendant breached any warranty."

Mr. Schell: We have now——

The Court: The original one you proposed—well, it is a modification of the one you originally proposed where I inserted “ordinary care” instead of “negligence.” The one now is:

“The mere fact that an accident happened, considered alone, does not support an inference that some party, or any party, to this action failed to exercise ordinary care.”

Mr. Schell: I am wondering whether that might be confusing. I mean it boils down to the same thing so far as lawyers are concerned, but I am wondering if it might be confusing because we are submitting to them on the over-all basis of a breach of warranty, and we say what that warranty is. That is why we suggested this particular instruction.

The Court: I think the latter one, your proposed instruction A-1, is more applicable now than this.

Mr. Schell: I think it is, instead of the new 15.

The Court: Then the instruction to be given will be 15 and will read as follows:

“The mere fact that an accident happened, considered alone, does not support an inference that the defendant breached any warranty.”

What is 14 in your set will be renumbered 16 and reads: [320-12]

“The defendant was not an insurer of the safety of the plaintiff.”

Mr. Schell: Yes, sir.

The Court: Then what was numbered as instruction 19 in this set I gave you I have renumbered 17 and modified it to read as follows:

“In order to establish”——

I have stricken the words “a right of recovery based upon the implied warranty of the defendant in this case,” and inserted instead the words “the essential elements of his case.”

“In order to establish the essential elements of his case, the burden is upon the plaintiff to prove, by a preponderance of the evidence, all the following facts:”

In considering that proposed modification you might have in mind instruction 8, the first paragraph of which states:

“The burden is on the plaintiff in a civil action, such as this case now on trial, to prove every essential element of his case by preponderance of the evidence, and if the plaintiff fails to prove any essential element of his case by a preponderance of the evidence, then you must find for the defendant.”

I was attempting to tie that instruction into what had gone before in instruction 8. After “all the following [320-13] facts:

“First, that the mule ‘Chiggers’ was not fit and suitable for the purpose for which the defendant hired or let or rented him to the plaintiff; second, that prior to the accident”——

I have inserted "prior to the accident" the following:

"That"—"second, that prior to the accident, the defendant, through one or more of its agents, knew, or in the exercise or ordinary care"—

Mr. Lincoln: "of" may I change that? "of" it should be, your Honor.

The Court: Oh, yes; a typographical error.

Mr. Lincoln: Yes, sir.

The Court:

"of ordinary care under the circumstances should have known, that the mule ridden by the plaintiff was not fit and suitable for the purpose for which the defendant let him to the plaintiff; and third, that such breach of the implied warranty of the defendant as to the fitness and suitability of the mule was a proximate cause of any injuries and consequent damages sustained by the plaintiff."

Mr. Lincoln: We are satisfied.

Mr. Schell: We are satisfied.

The Court: Very well. What was 17 becomes 18. That [320-14] is:

"The proximate cause of an injury"—the definition of "proximate cause."

What was 18 becomes 19, which reads at the beginning:

"This does not mean that the law seeks and recognizes only one proximate cause of an injury,"—

Mr. Schell: I think that is one of the standard.

The Court: Yes; those are both from the California Standard Instructions.

Mr. Lincoln: Yes; we are satisfied.

The Court: BAJI. Then 20 is your No. 20 and I have not made any changes in that.

Mr. Schell: I think that is standard.

Mr. Lincoln: We have no objection.

The Court: You feel that is satisfactory?

Mr. Lincoln: Yes, sir.

The Court: Very well. What is 21 now will go out. That is the one in addition to the implied warranty I have just mentioned. "The plaintiff alleges," etc., dealing with express warranty. That will be eliminated.

Mr. Lincoln: That goes out entirely?

The Court: Yes.

Mr. Lincoln: Yes, sir.

The Court: And 22, which also deals with the essential elements of recovery for an express warranty, will go out [320-15] entirely.

Then the present 23 will become 21; 24 will become 22; 25, of course, will become 23; 26 will become 24; 27 will become 25; 28 will become 26; 29 will become 27; 30 will become 28; 31 will become 29; 32 will become 30; 33 will become 31; 34 will become 32.

If there is any objection to any of these that you gentlemen wish to call attention to now or any suggestions with respect to any of them as we go along, you may. They are mostly so-called stock instructions.

Mr. Lincoln: Yes, sir.

The Court: 35 will become 33; 36 will become 34; and the last one, 37, will become 35.

I have here re-written copies of what are now court's instructions 10, 11, 12, and 15, and I will ask the clerk to pass a copy of each one to you gentlemen.

Here is a re-draft, gentlemen, of court's instruction No. 17 that the clerk will pass you copies of.

Are you gentlemen satisfied, as far as you now know, with the instructions proposed to be given?

Mr. Schell: There is just one thing. I am now addressing myself not to the instructions that have been given but those that have been missed. Insofar as the ones that are given, I think those are satisfactory.

The Court: In other words, those that we have numbered [320-16] here 1 to 35, inclusive.

Mr. Schell: But we proposed instructions on two things: One, the assumption of risk, and contributory negligence; and particularly on the assumption of risk, which always is present in any enterprise, and we are always entitled to an instruction that anyone assumes the risk that is normally to be undertaken in an enterprise such as this. We start with our instructions No. 27 and 27.

The Court: Let me follow you here.

Mr. Schell: Our requested instructions, not the court's instructions.

The Court: Defendant's requested instructions.

Mr. Schell: 27 and 28 and 29 are the instructions on the assumption of risk. Our requested instructions are those numbers.

The Court: My view of that is that where contributory negligence is involved, if that is your defense, it seems to me it would be proper to instruct the jury, if the case was submitted on the question of negligence, alone, or if it were submitted on the issue of negligence along with the issue of breach of warranty. But these proffered instructions are both as to contributory negligence and assumption of risk.

Mr. Schell: Both are pleaded.

The Court: Yes; I recall. But I have been unable to [320-17] see assumption of risk would be a defense, any more than contributory negligence.

The jury is told that the breach of warranty must be the proximate cause of the injuries in order for plaintiff to recover. If the jury finds, for example, the only proximate cause of the accident were the plaintiff's negligence, notwithstanding the fact that contributory negligence is not a defense, they would find for the defendant, would they not?

Mr. Schell: I think that in a breach of warranty this type of contributory negligence is a defense, assuming that there was a breach of warranty.

The Court: It would not bar his recovery.

Mr. Schell: Oh, I think so.

The Court: You mean if he contributed in the slightest degree?

Mr. Schell: That is right; just like any other negligence case. That is my view of it, that contributory negligence is a bar to recovery.

(Discussion of court and counsel on legal points omitted from transcript.)

The Court: Isn't that implicit in our instructions here, instructions 15 and 16?

"The mere fact that an accident happened, considered alone, does not support an inference [320-18] that the defendant breached any warranty."

Isn't there implicit in that statement that the defendant is not liable for anything that would have happened anyhow? In other words, irrespective of the defendant's conduct?

In other words, the defendant is not liable for damages caused by dangers inherent in the enterprise.

And take 16:

"The defendant was not an insurer of the safety of the plaintiff."

Mr. Schell: Yes; I appreciate those concessions.

The Court: "The defendant is not an insurer of the safety of the plaintiff. The plaintiff"—

If you added another sentence there: "The plaintiff assumed the risks inherent in the enterprise," isn't that implicit?

Mr. Schell: Would it be implicit in the mind of the jury? That is what these are for.

Your Honor asked me a question. I am not certain. I am just wondering.

(Argument omitted from transcript.)

The Court: You see, the great danger here, the way these requested instructions, say, 27, is worded, the jury could very easily understand: Well, this is a risky venture, so he assumed all the risks in connection with it. [320-19]

Mr. Schell: Certainly 28, I think, clears that up.

The Court: 28 could clear it up if it were modified to read—that is, your requested instruction No. 28 could be modified to read: If the jury find that the plaintiff was injured not as the proximate result of any breach of warranty on the part of the defendant but by reason of the risk assumed, the risk inherent in the enterprise.

It seems to me you have to negative the very basis upon which the jury has already been told the only basis upon which the plaintiff could recover. The jury has been told now that in order to establish his case he must establish three things, three facts.

Mr. Schell: Well, I think possibly the modification might be proper under those circumstances.

The Court: That is instruction 17 and it follows the instruction 16, the court's instruction 16, which states the defendant is not an insurer of the plaintiff. In other words, starting with instruction 15 and reading those three, 15, 16 and 17 of the court's instructions, reading those together, isn't the jury told in effect that the defendant is not guaranteeing the safety of the plaintiff? The mere fact that he was thrown off of a mule, alone, does not mean he is entitled to recover; that in order for him to recover he has to establish by a preponderance of the evidence all of the three propositions of fact stated in instruction 17: [320-20] First, that the mule "Chiggers" was not fit and suitable for the purpose for which he was hired; second, that if prior to the accident defendant

knew or in the exercise of reasonable care should have known that fact; and third, that such breach was a proximate cause of the injury.

It seems to me that if plaintiff could establish those propositions, if they were convinced of those propositions, the plaintiff should recover.

Mr. Schell: Taking these two together, contributory negligence and the assumption of risk, while they are different, let us assume a hypothetical case. I am trying to clarify my mind.

The Court: Yes.

Mr. Schell: And that would be this: Assuming for the moment that the defendant did commit a breach of the warranty in the given case by not exercising due care in selecting a proper animal, assume that was established; in other words, some fellow, as your Honor said, walked up and said, "Here, I want to sell you a mule for \$10.00." "Is he gentle?" "Yes, he is gentle." "Here is your \$10.00." And they put him on the pack string. There undoubtedly would be a breach of warranty there, assuming the mule was not gentle.

Then we will say the plaintiff, in at least thinking he is a rider, gets himself a pair of spurs. He proceeds to wrack the mule with his spurs and the results achieved [320-21] are that he is dismounted suddenly, violently and severely.

Well, I would say that he could not recover, even though there was a breach of warranty, because contributory negligence in that instance would be a bar.

I use that as a very broad illustration to put across the point I have in mind. In other words, I think you can have contributory negligence as a bar, even though there is a so-called breach of warranty, because I think the breach of warranty is—I try to rationalize the statements that the courts use here, and I think they do it to get around the situation that through inaction go to the failure to make inquiry, rather than to some overt act or express knowledge. They are trying to express and say that the rule of due care in these cases is that you must find out and see whether that animal is safe; you must exercise reasonable care to that end.

The Court: What is your view on this question of contributory negligence?

Mr. Lincoln: Suppose we have a young fellow, fresh from the country, who has never seen a trolley car in his life, comes into the big city, never has seen a trolley car and never ridden on a trolley car, doesn't know what kind of an animal it is. He comes into the big city and he sees this big piece of machinery coming toward him. His friend, who is introducing him to the city for the first time, says, [320-22] "All right; it is perfectly safe. Go ahead." He goes ahead and the car hits him. Does he assume a risk? He doesn't know anything about it; he hasn't the slightest idea what the consequence might be by walking ahead; doesn't know but possibly there is some automatic device, if he knows about automatic devices.

The Court: You have to test it by the extreme case, hence presumably all the facts of life.

Mr. Lincoln: But our situation, your Honor, it seems to me is almost identical with the one which I have suggested.

The Court: It may be factually, but we are testing it by an extreme case. The question is: If someone had been throw off the mule on this trail the day before and this plaintiff knew about it and took the trip, the duty of the defendant toward him would be the same.

Mr. Lincoln: Under that circumstance, I think—

The Court: I do not think the defendant would be heard to come in here and say—well, it would be one of the circumstances, if it were a matter of common knowledge or these people were thrown off mules every day, that would be one of the circumstances.

Mr. Lincoln: No question then but he would assume a risk.

The Court: That would be brought home.

Mr. Lincoln: No question about it, sir. [320-23]

The Court: Then you are arguing a question of fact.

Mr. Lincoln: No. My suggestion is this, your Honor: If you have the defense of assumed risk, you must have the original proposition on which that is based factually that there is a risk.

The Court: Well, the plaintiff assumes a risk, otherwise the defendant is an insurer, is he not?

Mr. Schell: That is right.

Mr. Lincoln: Well, it does not seem to me, your Honor, I would go quite that far.

The Court: In other words, here is a certain risk. It does not make any difference whether it is X risk or 20X risk or a thousand X plus Y risk, whatever the quantity of the risk is, the parties acting on the scene altogether assume it, do they not? They assume 100 per cent of the risk as between the parties who went down this trail and the defendant on that day; or, to apply it specifically to our case, as between this plaintiff and the defendant, the two of them together assumed 100 per cent the risk of that undertaking, did they not?

Mr. Lincoln: Whatever it may have been.

The Court: Yes.

Mr. Lincoln: All right.

The Court: 100 per cent of it was assumed by the parties involved. [320-24]

Mr. Lincoln: Yes.

The Court: If the defendant had assumed 100 per cent of the risk, he would be an insurer, would he not? So the plaintiff assumed some of it. He assumed some of it. He assumed that which was inherent in the nature of the excursion and not occasioned by any want of ordinary care under the circumstances on the part of the defendant.

Mr. Lincoln: And also, I think, assuming that he knew that there was any risk involved.

The Court: Well, he would have to be pretty young not to know there was some risk involved.

Even if you are insured, you know there is some risk involved. The law may impose it all upon an insurer, but there is a risk. That is what the basis of the insurance is, isn't it?

Mr. Lincoln: Of course, I suppose that we might carry that to a logical conclusion. Maybe there is even a risk in walking down the sidewalk at any time.

The Court: Yes; there is a risk in every undertaking, and the question is how we can tell this to the jury without having them misunderstand what it is. I had the thought that it was covered or that it was implicit in instructions 15 and 16.

Mr. Lincoln: I think it is sufficiently.

The Court: What about contributory negligence?

Mr. Lincoln: Well, of course, as I still say, you can't [320-25] have the corollary unless you have the original proposition. You can't have contributory negligence unless you have negligence. You can't have something which makes a thing unless you have the thing itself, and here we do not claim negligence; so there can't be something which contributes to something which does not exist.

The Court: Mr. Lincoln, what do you say to the case put by Mr. Schell, where a rider did some unorthodox thing in connection with the handling of a mule? Suppose the evidence here showed that the plaintiff was pulling on the reins all the time.

Mr. Lincoln: Anybody who gets on a mule and sticks spurs into him ought to be thrown.

The Court: That is a layman's answer, but give me the lawyer's answer now.

Mr. Lincoln: I think that is a lawyer's answer, too.

The Court: All right. How would you tell the jury that in your instruction?

Mr. Lincoln: That would be something more than an assumed risk.

The Court: I am talking about contributory negligence now.

Mr. Lincoln: Oh, pardon me, sir.

The Court: Would that negligence bar the recovery of plaintiff for breach of warranty? [320-26]

Mr. Lincoln: I can't quite see where the two theories which we are endeavoring to present here are at all compatible. It seems to me, your Honor, if we have, as your Honor has now, these propositions of law based upon implied warranty, having separated out the difference between a warranty and a negligent act, as we endeavored to do—I do not quite see how we can have both at the same time.

If we have one, we can't have the other; if we have the negligence rule, then your implied warranty does not apply.

The Court: If a person uses any article negligently and that negligence is the proximate cause of the injury, does not that bar his recovery for a breach of implied warranty or express warranty?

Mr. Lincoln: Well, if he was using that, we will say, negligently and carelessly or something of that sort, and obviously the implied warranty

which was presented by the maker or the owner or whatever it may be was false, he would lose his case, even though, as I think your Honor very wisely suggested, even though the plea of any negligence or contributory negligence was not made.

The Court: With respect to the assumption of risk instruction 16 merely says that "The defendant was not an insurer of the safety of the plaintiff."

Would it meet the defendant's objection to add to that [320-27] court's instruction 16 the second sentence, which states:

"The plaintiff assumed all risks inherent in the trip which were not proximately caused by a breach of the defendant's implied warranty as to the fitness and suitability of the mule to be ridden by the plaintiff on the trip"?

Mr. Schell: May I have that once more, please?

The Court: "The plaintiff assumed all risks inherent in the trip which were proximately caused by a breach of the defendant's implied warranty as to the fitness and suitability of the mule to be ridden by the plaintiff on the trip."

Mr. Schell: "By a breach of the defendant's implied warranty"? I think that would certainly clarify it, your Honor.

Mr. Lincoln: If your Honor had in mind giving what that meant, in addition to the instruction, we would respectfully ask that your Honor add a little more to it, to the effect whether or not the plaintiff knew or could with reasonable care have known what risk he was encountering.

It would seem to me that there must be something there which would put the plaintiff on notice that there was not the ordinary risk inherent in any ordinary undertaking, but there was in this particular instance an unusual and extraordinary risk which he was expected to assume. And I [320-28] respectfully submit that, insofar as the evidence is concerned, there is not a shadow of anything to that effect.

The Court: Of course, the cases all say that what he knew or, in the exercise of reasonable care should have known, strictly speaking, that is what he in effect assumed. But in law, he assumed everything that the defendant did not assume, did he not?

I think that I will suggest this alternative statement, which seems to me would be clearer to the jury, who probably never heard of a warranty before in their lives.

“The plaintiff assumed all risks inherent in the trip which were not proximately caused by failure of defendant to exercise ordinary care under the circumstances.”

Mr. Lincoln: Might I have that again, if your Honor please?

The Court: “The plaintiff assumed all risks inherent in the trip which were not proximately caused by failure of the defendant to exercise ordinary care under the circumstances.”

Mr. Lincoln: May we put in there before the word “care” the word “continuing,” or before the word “ordinary” the word “continuing”?

Mr. Schell: That certainly would change the meaning.

Mr. Lincoln: I take it, your Honor, that the defendant [320-29] is not merely entitled to say, "Well, I used ordinary care up to the top of the rim."

The Court: Oh, no.

Mr. Lincoln: "Now, you go from here, and I don't use any more care at all. I don't take any care of what happens below there. That is your responsibility 99.44 per cent."

The Court: But the warranty, if you will look at instruction 12, states "that throughout the trip."

Mr. Lincoln: Well, then, the word "continuing"—yes, sir. The word "continuing" fits in with that very same thought. That, I think, is the law. He does not relieve himself of responsibility just as soon as Mr. Mateas, for example, starts on the trip, but his care continues all the way down, the same care, if your please, which he exercised up to that point.

I think, in one sense of the word, he should exercise greater care, but nevertheless, we will assume that ordinary care might be sufficient. That care would have to be constant.

The Court: See if this meets your objection: To add to instruction 16, the court's number, which now reads:

"The defendant was not an insurer of the safety of the plaintiff."

I think if you read 15 along with that—in other words, let us do what we tell the jury to do, to

consider [320-30] all the instructions together, and see if it meets the situation.

15 now reads:

“The mere fact that an accident happened, considered alone, does not support an inference that the defendant breached any warranty.”

The court's No. 16 now reads:

“The defendant was not an insurer of the safety of the plaintiff.”

Now, add to that this sentence:

“The plaintiff assumed all risks inherent in the trip which were not proximately caused by failure of the defendant either before or at the time of the accident to exercise ordinary care under the circumstances.”

Mr. Lincoln: May I have that language, if your Honor please, after the words “which were not proximately caused”?

The Court: “By a failure of the defendant either before or at the time of the accident to exercise ordinary care under the circumstances.”

Or, as an alternative:

“Plaintiff assumed all risks inherent in the trip which were not proximately caused by a breach of the defendant's implied warranty as above stated.”

I do not assume the defendant contends that the plaintiff [320-31] assumed any greater risk?

Mr. Schell: No. I think the leading case on assumption of risk, if your Honor please, is somebody versus LaFrance.

Mr. Lincoln: I would prefer, if that assumption of risk goes at all, the suggestion which your Honor has made.

The Court: We can modify it now to state that "he assumed all risks which he knew or reasonably should have known were inherent in the trip."

That would be, strictly speaking, greater, if you desire to amplify it to that extent, Mr. Lincoln.

Mr. Lincoln: "or reasonably should have known," sir?

The Court: "Plaintiff assumed all risks which he knew or reasonably should have known."

Mr. Lincoln: "to be inherent in the trip"?

The Court: "which he knew, or in the exercise of ordinary care should have known." Do you prefer to have that added qualification?

Mr. Lincoln: I think the word "reasonably" covers that, "reasonably should have known."

The Court: Well, capable of using ordinary care.

Mr. Lincoln: All right.

The Court: If you want to qualify it. The reason I did not qualify it in the first suggestion is because I take it the jury will assume that any person capable of reasoning would know there was some risk attached to riding [320-32] a mule down a mountain trail. There is no evidence here that there was any concealed risk such as there are in some cases where that qualifying language is usually used.

Would you prefer it to be used?

Mr. Lincoln: This is all right, sir, "in the exercise of ordinary care."

The Court: "The plaintiff assumed all risks which he knew, or in the exercise of ordinary care should have known, were inherent in the trip."

I think we will have to break that into two sentences now.

"However, the plaintiff did not assume any risk proximately caused by failure of the defendant, either before or at the time of the accident, to exercise ordinary care under the circumstances."

Mr. Schell: Mulling this over in my mind, this thought occurs to me: "ordinary care," I wonder whether that is a correct statement of law, that latter part, that latter exclusion, unless that latter qualification is also qualified.

Let us assume that the plaintiff realized part of the way down that the saddle was loose and called it to the attention of the guide, and the guide said, "I am sorry. There are no more holes in the saddle; we can't tighten it up," and let it go at that; and he felt the thing slip back and forth and slip back and forth and yet he continued to [320-33] ride; wouldn't he assume that risk, once he knew it existed? Wouldn't he assume that risk?

The Court: I do not think so.

Mr. Schell: There is that case where I think the person was barred from recovery. He was going with either a one-armed or one-eyed driver, and realized after a while that he could not see where

he was going, and eventually the car ran off the road because he either could not see and turned or could not make it because of the one arm, and recovery was denied on the ground that he assumed the risk.

In other words, I think you assume at the start the risk inherent in the enterprise, and then if a risk appears later that you did not know at the start, and you continue to go on—I know, for instance, if I were on that trail and I found that the saddle girth were broken and called it to the attention of the guide and he said, “Go ahead,” I would walk.

The Court: Yes. But I do not see how it can be said that he assumed that when the guide is in charge and told him in effect it would be safe for him to go ahead and ride. It is a question of who has superior knowledge, after all.

Mr. Lincoln: Of course, that is the point we have here. We have the statement, and perhaps some slight possible contradiction or interpretation of it, that the guide told the plaintiff to stay upon this particular mule which plaintiff had a reason at that time to believe was dangerous. That being so, we [320-34] respectfully submit that that was not an assumed risk.

The Court: Would this cover the situation, gentlemen, having in mind the court’s instructions 15 and 17: To amend instruction 16 to read as follows:

“The defendant was not an insurer of the safety of the plaintiff. The plaintiff assumed

all risks of the trip which were not proximately caused by failure of the defendant, either before or at the time of the accident, to exercise ordinary care under the circumstances.”

Shall I read it again?

Mr. Lincoln: If you will, please.

The Court:

“The plaintiff assumed all risks of the trip which were not proximately caused by failure of the defendant, either before or at the time of the accident, to exercise ordinary care under the circumstances.”

Mr. Lincoln: It seems to me, your Honor, that that covers almost too broad a latitude insofar as the plaintiff's responsibility is concerned.

The Court: Isn't that a correct statement of the law?

Mr. Lincoln: I think, sir, it is a correct statement insofar as it goes; but it seems to me that it should include [320-35] what your Honor, to my mind, so wisely included before, namely, he assumed all risks, in the exercise of ordinary care, which he knew or should have known, himself. To my mind that is something which the jury should be told insofar as plaintiff's knowledge, lack of knowledge, opportunity for knowledge, reason for knowledge, or reason for lack of knowledge is concerned before it drops down to the bald statement of what the defendant's excuses were. I think, under the circumstances of this particular case, the way in which your Honor had it originally is a much better statement of the law applicable to this situation.

The Court: Yes. I suppose that limits one of the circumstances which fixes the quantum of defendant's duty of care is what the plaintiff knew.

Mr. Lincoln: Or could have known.

The Court: I do not agree on the fact that the assumption of risk is necessarily limited or is not applicable to the acts of the defendant which the plaintiff should have known.

Mr. Schell: I do not agree on the fact that the assumption of risk is necessarily limited or is not applicable to the acts of the defendant which the plaintiff should have known.

The Court: The plaintiff is not charged with assuming a risk of anything that he did not know, or in the exercise of ordinary care should have known was a risk.

Mr. Schell: That I am not objecting to. But my idea [320-36] is that if he knew, even if the defendant was negligent and the plaintiff knew that. Supposing that the defendant were negligent, and when he walked up there to this mule it started bucking in the corral, nevertheless he climbed aboard and tried to ride it out; wouldn't he have assumed that risk? Even if he got pitched off up there in the corral and got up and dusted himself off and climbed on again?

The Court: It depends. If there were nothing more, it probably would. But if the guide said, "He is all right. He just does that because he is frisky, and does that when you first get on in the morning." That would be another thing, would it not?

Mr. Schell: What I am trying to say, I do not think we can limit it to the fact that it was not caused by their negligence, because I think in some instances it can be assumed, even then. We sometimes have to make violent illustrations.

The Court: The extreme case is always the test of the principle.

(Further discussion of court and counsel omitted from transcript.)

The Court: Your instruction 27 is based upon the assumption that if he knows of a risk he assumes it, even though it may be caused by a breach of warranty.

Mr. Schell: I think this is a standard instruction on the [320-37] assumption of risk, this 27 and 28.

The Court: I think the case you put, the question would be one of contributory negligence and not assumption of risk, because it presupposes negligence of the defendant.

Mr. Schell: Yes, it presupposes.

The Court: Or a breach of warranty by the defendant. As your requested instruction 29 states the distinction, contributory negligence must contribute to the injury, whereas the risks that the plaintiff here assumed were risks with respect to which he had no duty of care. He did not assume risks beyond that.

Mr. Schell: He did not until they became known to him.

The Court: Then it is a question of contributory negligence. It is not a question of whether he assumed the risk; it is a question of whether he, him-

self, was negligent and his negligence contributed to the injury, it seems to me.

Mr. Schell: Well, possibly that is the distinction. But I think, once he knew that the risk was inherent or was there, and he continued to act, that is a question of fact whether or not he either assumed the risk or was guilty of contributory negligence.

The Court: In view of our last remarks would this meet the situation for court's No. 16:

“The defendant was not an insurer of the safety of [320-28] plaintiff. The plaintiff assumed all risks which he knew, or in the exercise of ordinary care should have known, were inherent in the trip; but the plaintiff did not assume any risks which were proximately caused by the failure of the defendant, either before or at the time of the accident, to exercise ordinary care under the circumstances.”

It seems to me that to use the words “inherent in the enterprise by itself” means that it is not caused by any negligence.

Mr. Schell: I think, if it is inherent in the enterprise, that really does assume that. Of course, I think that the things that are inherent to the enterprise or inherent in the particular enterprise would become known a little later on.

The Court: I do not believe it includes negligent acts, risks caused by negligence.

Mr. Schell: If you say “contributory negligence” and mean something brand new, but where they have knowledge of the negligent condition such

as, we will say, a defective saddle or no reins on the bridle or something like that, it might be something else again, because that would be inherent in that particular trip. In other words, I think, an overt act just happening suddenly, he would not assume [320-39] that.

The Court: That is where the assumption of risk would blend into your contributory negligence.

Mr. Schell: Yes. There is a very fine line of demarcation where one starts and the other stops.

It is quite difficult.

The Court: If the risk, caused by certain negligence of the defendant, had proceeded for such a long time it was part of the inherent nature of the undertaking.

Mr. Schell: In other words, the case where people ride with somebody else, having no control, and they continue to ride at night without any headlights, they have assumed the risk, even though that is caused by the negligence of the driver continuing to drive without headlights. On the other hand, if he suddenly switched the headlights off while they were driving, that is something else.

The Court: Yes. I suppose it can proceed long enough to cross the border line and be a part of the inherent nature.

Mr. Schell: Become a part of the inherent nature of the trip. I mean if the jury should believe his story that this mule forged ahead all the time during the trip, etc., then it might have become an inherent part of the enterprise by that time, four hours of it.

The Court: I do not think there is any evidence here [320-40] that any negligent acts of these defendants had continued for such a time as to become an inherent part of the enterprise; and the defendant has contended throughout that it has done everything humanly possible.

Mr. Schell: What I had in mind was the one witness, the one lady, who testified rather more than anybody else that from the moment this trip started it was a ruckus, you might say, going on in the back between Chiggers and Mr. Mateas; and if by any chance the jury should believe that, that became almost inherent in the enterprise by that time.

The Court: Mr. Lincoln, do you have any comments to make on this latest suggestion?

Mr. Lincoln: No, sir. I am satisfied with it, as I say, if we must assume risk at all.

The Court: Then I will have 16 rewritten to add this second sentence here that I have just read.

* * * * *

Mr. Schell: Shall we let your jury go? They probably have something they would like to do.

The Court: Yes, in just a moment.

Will you bring the jury in, Mr. Bailiff? You think we will be ready, gentlemen, by 1:30?

Mr. Schell: Will your Honor instruct them then today and send them out?

The Court: Just a moment, Mr. Bailiff. If we start at 1:30 it will be 2:40 before we finish the argument, will [320-41] the other one I think your Honor has suggested, if we proceed upon implied warranty, then obviously we do not proceed upon

negligence. And it seems to me, as I say, that negligence is not raised and you cannot contribute to that which is not an issue.

The Court: Have you any cases on that question?

Mr. Schell: I haven't now. I might be able to dig some up very shortly.

The Court: Let us come back and discuss that at 1:30.

Mr. Lincoln: All right.

The Court: See if you can find anything on it.

Mr. Schell: I will endeavor to, yes, your Honor.

Just to leave a parting thought, in view of the way these cases are treated, in other words, it is the same thing by a different name; it must be negligence in order to constitute a breach, and that has been my primary thought. If you want to call it negligence or breach of warranty, it is still the same animal and you are not talking about "Chiggers."

The Court: Your view, I take it, is that the only function of law which raises the implied warranty is to impose the duty of care?

Mr. Schell: That is right.

The Court: Which otherwise would not arise out of the relationship? [320-47]

Mr. Schell: That is right. In other words, it is an implied agreement of exercising care and it defines what that care is. It must be both negative and positive, so to speak. In other words, it is not an overt act alone, but they must make inquiry. It sets the standard of care.

The Court: Did the clerk hand you gentlemen forms of proposed verdict?

Mr. Schell: Yes. They are satisfactory. [320-48]

* * * * *

The Court: Do you wish an instruction given on inevitable and unavoidable accident, Mr. Schell?

Mr. Schell: I would prefer it; yes, your Honor.

I would say I found two cases during the noon hour, both cases being somewhat old friends of ours that we have talked about heretofore, on the point of contributory negligence and assumption of risk.

The Court: Yes. First, as long as I opened the question of inevitable and unavoidable accident, I drafted a modification of your requested instruction. Mr. Clerk, will you hand the copies to counsel? I have numbered it 14-A. It seems to me that would be an appropriate place for it to be inserted.

Mr. Schell: It is entirely satisfactory.

The Court: Now will you cite me the authorities? [320-49]

(Further discussion of counsel and the court on legal questions omitted from transcript.)

The Court: It seems to me that contributory negligence has no place in the action, and I had so assumed, Mr. Schell. I did not find it pleaded in the answer to the second amended complaint.

Mr. Schell: You say it is not pleaded?

The Court: Inevitable and unavoidable accident is pleaded and assumption of risk.

Mr. Schell: Your Honor is right there. I was under the assumption that it had been pleaded. No; it is not pleaded, your Honor. I have been laboring under the assumption that it had been.

The Court: Do you gentlemen have any further suggestions or comments with respect to the intended instructions now?

Mr. Schell: Not any more.

The Court: Have you, Mr. Lincoln?

Mr. Lincoln: I have none; no, sir.

The Court: Are you ready to proceed with the argument?

Mr. Schell: Ready as far as we are concerned.

The Court: Are you ready?

Mr. Lincoln: Yes, sir; we are ready.

Mr. Schell: We are ready. [320-50]

* * * * *

COURT'S CHARGE TO THE JURY

Ladies and Gentlemen of the Jury:

It is now my duty to instruct you as to the law governing this case. It is your duty, as jurors, to follow the law as stated in the instructions of the Court and to apply the law so given to the facts as you find them from the evidence before you.

The jury must accept the instructions of the Court as comprising together a complete and correct statement of the law governing the case. Do not single out one instruction alone as stating the law, but consider the instructions as a whole.

Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court.

The law of the United States permits the judge to comment to the jury on the evidence in the case. Such [325] comments are only expressions of the judge's opinion as to the facts; and the jury may disregard them entirely, since the jurors are the sole judges of the facts.

It is not my custom to include comments on the evidence in my instructions to the jury; nor shall I do so in this case, because I am satisfied you are fully capable of determining the facts without my aid.

You are here for the purpose of trying issues of fact presented by the allegations of the second amended complaint of the plaintiff, Elmer H. Mateas, and the answer thereto of the defendant, Fred Harvey, a corporation. You are to perform this duty without bias or prejudice as to either party. The law does not permit jurors to be governed by sympathy, prejudice, or public opinion. The parties and the public expect that you will carefully and dispassionately consider all the evidence, follow the law as stated by the Court, and reach a verdict just to each side, regardless of what the consequences may be.

You, as jurors, are the sole judges of the credibility of the witnesses and the weight to which their testimony is entitled. A witness is presumed to speak the truth. However, this presumption may be outweighed by the manner in which the witness testifies, by the character of the testimony given, or by contradictory evidence. You should [326] carefully scrutinize the testimony given, and all the circum-

stances under which each witness has testified. Consider each witness's intelligence, demeanor and manner while on the stand, and the relation which he or she may bear to each side of the case. Consider also the manner in which each witness might be affected by the verdict, the extent to which, if at all, he or she is either supported or contradicted by other evidence, and every other matter in evidence which tends to indicate whether the witness is worthy of belief.

If you find that the presumption of truthfulness has been outweighed as to any witness, you will give the testimony of that witness such credibility, if any, as may be directed by your judgment as reasonable men and women.

A witness may be impeached and discredited by contradictory evidence; or by evidence that at other times the witness has made statements which are inconsistent with the witness's present testimony.

If you believe any witness has been impeached, you will give the testimony of that witness such credibility as you may think it entitled to, if any.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness's testimony in other particulars. And you may reject all the testimony of that witness which [327] is not corroborated or supported by other credible evidence.

You are not bound to decide any issue of fact in accordance with the testimony of a number of witnesses which does not produce conviction in your minds, as against the testimony of a lesser number

of witnesses or other evidence which does produce conviction in your minds. The test is not which side brings the greater number of witnesses, or presents the greater quantity of evidence, but which witness and which evidence appeals to your minds as being most accurate and otherwise trustworthy.

The testimony of a single witness, which produces conviction in your minds, is sufficient for the proof of any fact, and would justify a verdict in accordance with such testimony even though a number of witnesses may have testified to the contrary if, after weighing all the evidence in the case, the jury believes that the balance of probability points to the accuracy and honesty of the one witness.

The burden is on the plaintiff in a civil action, such as this case now on trial, to prove every essential element of his case by a preponderance of the evidence, and if the plaintiff fails to prove any essential element of his case by a preponderance of the evidence, then you must find for the defendant.

The term "preponderance of the evidence" means the greater weight of the evidence. In other words, such evidence as, when weighed with that opposed to it, has more convincing force and produces in your minds conviction of the greater probability of truth.

While it is incumbent upon the party who asserts the affirmative of an issue, thus having the burden of proof, to prove his allegations by a preponderance of the evidence, the law does not require demonstration, or such degree of proof as produces absolute certainty; because such proof is rarely possible.

In a civil action such as this, it is proper to find that a party has succeeded in carrying the burden of proof on an issue of fact, if the evidence favoring such party's side of the question is more convincing than that tending to support the contrary side, and causes the jury to believe that the probability of truth on such issue favors that party.

The plaintiff in this case claims damages for personal injuries alleged to have been suffered by him as a proximate result of claimed breach of the implied warranty made by the defendant in connection with the hiring or letting or renting to the plaintiff of a mule named "Chiggers" for a trip on June 17, 1942, down Bright Angel Trail into the Grand Canyon of Arizona.

The law imposes upon persons who hire or let or rent personal property, such as a mule, the legal duty to [329] put such property into a condition fit for the purpose for which it is let or rented or hired.

That is to say, one who rents or lets or hires an animal such as a mule for riding purposes is held by law impliedly to warrant to the rider that the owner of the animal had exercised ordinary care under the circumstances to see to it that the animal is fit and suitable for the purpose for which the mule is hired.

In this case, then, the defendant impliedly warranted to the plaintiff that the defendant had exercised ordinary care under the circumstances to see to it that the mule "Chiggers" was fit and suitable to be ridden by the plaintiff down Bright Angel

Trail; and further, that throughout the trip the defendant's agents in charge of the party would continue to exercise ordinary care under the circumstances to see to it that the mule "Chiggers" was fit and suitable to be ridden by the plaintiff.

Ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs in order to avoid injury to themselves or to others.

Ordinary care is not an absolute term, but a relative one. By this we mean that in deciding whether ordinary care was exercised in a given case, the conduct in question must be considered in the light of all the surrounding circumstances, as shown by the evidence. [330]

The mere fact that an accident happened, considered alone, does not support an inference that the defendant breached any warranty.

The defendant was not an insurer of the safety of the plaintiff. The plaintiff assumed all risks which he knew, or in the exercise of ordinary care should have known, were inherent in the trip; but the plaintiff did not assume any risk which was proximately caused by failure of the defendant, either before or at the time of the accident, to exercise ordinary care under the circumstances.

The defendant alleges that the accident involved in this case was inevitable and unavoidable in so far as the defendant is concerned. The law recognizes what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was impossible for such an accident to be avoided, but

simply that the accident was not proximately caused by the failure to exercise ordinary care under the circumstances.

If you find that the defendant did at all times exercise ordinary care under the circumstances to furnish the plaintiff with a mule which was fit and suitable for the purpose of carrying the plaintiff on the trip involved in this case, then your verdict should be for the defendant.

In order to establish the essential elements of his case, the burden is upon the plaintiff to prove, by a [331] preponderance of the evidence, all the following facts: First, that the mule "Chiggers" was not fit and suitable for the purpose for which the defendant hired or let or rented him to the plaintiff; second, that prior to the accident the defendant, through one or more of its agents, knew, or in the exercise of ordinary care under the circumstances should have known, that the mule ridden by the plaintiff was not fit and suitable for the purpose for which the defendant let him to the plaintiff; and third, that such breach of the implied warranty of the defendant as to the fitness and suitability of the mule was a proximate cause of any injuries and consequent damages sustained by the plaintiff.

The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause—the one that necessarily sets in operation the factors that accomplish the injury.

This does not mean that the law seeks and recognizes only one proximate cause of an injury, consisting of only one factor, one act, one element of circumstance, or the conduct of only one person. To the contrary, the acts and omissions of two or more persons may work concurrently as the efficient cause of an injury, and in such a case, each of the participating acts or omissions is regarded in [332] law as a proximate cause.

The defendant in this case is a corporation and as such can act only through its officers and employees, who are its agents. The acts and omissions of an agent, done within the scope of his authority, are, in contemplation of law, the acts and omissions respectively of the corporation whose agent he is. It has been established that the mule involved in the accident was the property of the defendant and that it was in charge of agents of the defendant acting within the scope of their authority. Thus, the conduct of those agents shall be deemed by you to have been the conduct of the defendant corporation. Likewise, a corporation can gain knowledge only through its agents. So the knowledge of the defendant's agents as shown by a preponderance of the evidence shall be deemed by you to have been the knowledge of the defendant corporation.

In your consideration of the evidence you are not limited to the bald statements of the witnesses. On the contrary, you are authorized to draw, from facts which you find have been proved, such inferences as seem justified in the light of your experience as reasonable men and women.

You should distinguish carefully between what has been testified to by the witnesses and what has been stated by the attorneys. Statements and arguments of counsel are not evidence in the case. [333]

However, when the attorneys have stipulated or agreed to certain facts, you are to regard such facts as conclusively proved.

You must consider only the evidence before you. That evidence consists of the sworn testimony of the witnesses, the exhibits which have been received in evidence, and all facts which have been stipulated or agreed to by counsel.

Any evidence as to which an objection was sustained by the court, and any evidence which was ordered stricken by the court, must be entirely disregarded.

During the course of the trial, I have asked questions of certain witnesses. My object was to bring out in greater detail facts not then fully covered in the testimony. You are not to assume that I hold any opinion as to the matters to which the questions related. Remember at all times that you, as jurors, are at liberty to disregard all comments of the court in arriving at your own findings as to the facts.

The plaintiff alleges that by reason of injury to his spine and hip, proximately resulting from the accident involved in this case, he has sustained general damages in the sum of \$10,000 and has lost an additional sum of \$1,785 by reason of his absence from work. These allegations are not evidence of course, but merely the extent of [334] the plaintiff's claims and must not be considered by you as evidence.

Neither the allegations of the complain as to the amount of damage plaintiff claims to have suffered, nor the prayer asking for certain compensation, is to be considered by you in arriving at your verdict, except in this one respect, that the amount of damage alleged in the complaint does fix a maximum limit, and you are not permitted to award plaintiff more than that amount.

If, under the court's instructions, you should find that the plaintiff is entitled to a verdict, in arriving at the amount of the award you shall determine the reasonable value of the time lost, if any, by the plaintiff since his injury, wherein he has been unable to pursue his occupation. In determining this amount, you should consider evidence of plaintiff's earning capacity, his earnings, and the manner in which he ordinarily occupied his time before the injury, and find what he was reasonably certain to have earned in the time lost had he not been disabled.

If, under the court's instructions, you should find that the plaintiff is entitled to a verdict, you will award him such sum as will compensate him reasonably for any pain, discomfort and anxiety suffered by him and proximately resulting from the injury in question, and for such pain, discomfort and anxiety, if any, as he is reasonably certain to suffer in the future from the same cause. [335]

Such sum also as will compensate the plaintiff reasonably for any loss of earning power occasioned him by the damage in question, and from which he is reasonably certain to suffer in the future. In

fixing this amount you may consider what plaintiff's health, physical ability and earning power were before the accident and what they are now, the nature and extent of his injuries, whether or not they are reasonably certain to be permanent, or if not permanent, the extent of their duration, all to the end of determining the effect of his injuries upon his future earning capacity and the present value of the loss so suffered.

Damages must be reasonable. In the event that your verdict is for the plaintiff, you may award him only such damages as will fairly and reasonably compensate him for the injuries or damages which you believe from a preponderance of the evidence he has sustained as a proximate result of the accident.

The fact that I have instructed you as to the measure of damages in this case should not be considered as intimating any view of mine as to which party is entitled to your verdict. Instructions as to the measure of damages are intended for your guidance in the event you find from the evidence in favor of the plaintiff.

The verdict must represent the considered judgment [336] of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after a considera-

tion of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to change an opinion when convinced that it is erroneous. But do not surrender your honest conviction as to the effect or weight of evidence solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict.

Discrepancies in a witness's testimony or between his testimony and that of others, if there were any, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance. But a wilful falsehood always is a matter of importance and should be seriously considered. [337]

The attitude of jurors at the outset of their deliberations is important. It is rarely productive of good for a juror, upon entering the jury room, to make an emphatic expression of opinion on the case or to announce a determination to stand for a certain verdict. When a juror does that at the outset individual pride may become involved, and he or she may hesitate to recede from an announced position even when later shown that it is incorrect. You are not partisans. You are judges—judges of the facts. Your sole interest is to ascertain the truth. You will make a definite contribution to the administration of justice if you arrive at an impartial verdict in this case.

If it becomes necessary during your deliberations to communicate with the Court, do not indicate in any manner how the jury stands, numerically or otherwise, until you have reached a unanimous verdict.

* * * * *

The Court: Is it stipulated, gentlemen, that the jury has left the room? [338]

Mr. Lincoln: Yes, sir.

Mr. Schell: So stipulated.

The Court: Has the plaintiff any exceptions to note on the record to the instructions thus far given?

Mr. Lincoln: No, sir.

The Court: I have given all the instructions, with the exception of instruction 35 dealing with the selection of the foreman.

Has the defendant any exceptions to note on the record with respect to the instructions thus far given?

Mr. Schell: No, your Honor, except the instruction on the — I don't remember whether it is necessary to note an exception on the instructions nowadays—but the instruction on the assumption of risk, as I pointed out before, I feel it was broader—in other words, he assumed any risk, even though that risk might have been caused by the defendant, provided that plaintiff knew.

The Court: That refers back to our discussion the other day?

Mr. Schell: That refers back to our discussion.

The Court: That an act or omission of the de-

fendant might have gone on for a sufficient period of time back to prove the inherent risk of the enterprise?

Mr. Schell: That is correct.

The Court: And have been known, of course, to the plaintiff, or, in the exercise of due care, he should have [339] known. That is your contention?

Mr. Schell: That is my contention, yes.

The Court: Rule 51 states that “* * * No party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. * * *”

Of course, the purpose of that is to enable the trial judge to modify the instructions or give additional instructions to correct the error.

I have in mind your contention on that. I think that that is the law, but I do not see any applicability of it to this case.

Mr. Schell: I want to preserve my point here.

The Court: And I think it is possible for an act or an omission by a party to go on for such a period of time that it becomes part of the scene itself. But it seems to me, in a case such as this, it would have to be almost notorious if the Harvey Company did something or failed to do something that bore upon the safety of the trip or the fitness or suitability of the mule.

Are there any others?

Mr. Schell: No, your Honor. [340]

* * * * *

The Court: Ladies and gentlemen, I will now give you the concluding instruction.

Upon retiring to the jury room, you will select one of your number to act as foreman. The foreman will preside over your deliberations and will be your spokesman to the court.

Forms of verdict have been prepared for your convenience and I exhibit them to you. There are two forms. One is entitled in the court and cause, and reads:

“We, the jury in the above entitled cause, find in favor of the plaintiff, Elmer H. Mateas, and against the defendant, Fred Harvey, a corporation, and assess the plaintiff’s damages in the sum of” blank dollars.

“Los Angeles, California.

“October” blank, “1947.”

Blank line for signature over the words “Foreman of the Jury.”

In the event your verdict is for the plaintiff, you will have your foreman insert the amount of the damages which you assess in favor of the plaintiff and fill in the date and sign that verdict and return with it to the courtroom.

The other form is entitled, likewise, in the court and cause, and reads:

“We, the jury in the above entitled cause, find in favor of the defendant, Fred Harvey, a

corporation, and against the plaintiff, Elmer H. Mateas.

“Los Angeles, California.

“October” blank, “1947.”

A line for signature over the words “Foreman of the Jury.”

In the event your verdict is for the defendant, you will have the foreman complete the date, sign that verdict and return with it to the courtroom when you have reached a unanimous agreement.

The exhibits in the case will be available to you if you request them. [343]

* * * * *

“We, the jury in the above entitled cause, find in favor of the plaintiff, Elmer H. Mateas, and against the defendant, Fred Harvey, a corporation, and assess the plaintiff’s damages in the sum of \$7,500.00.

[Endorsed]: No. 11858. United States Circuit Court of Appeals for the Ninth Circuit. Fred Harvey, a corporation, Appellant, vs. Elmer H. Mateas, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed February 16, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11858

FRED HARVEY, a corporation,

Appellant,

vs.

ELMER H. MATEAS,

Appellee.

STATEMENT OF POINTS ON APPEAL

I.

That the trial court committed error in admitting in evidence the testimony of conversations between the plaintiff and a Mr. Boles, which conversations did not take place in the presence of or within the hearing of the defendant or any of its agents, servants or employees.

II.

That the trial court committed error in admitting in evidence the testimony of the witness Ella W. Vogel as to conversations which she heard between the plaintiff and a Mr. Boles, which hearing did not take place in the presence of or within the hearing of the defendant or any of its agents, servants or employees, and which testimony appears in the Reporter's transcript on pages 141 to 148 inclusive.

III.

That the court committed error in the giving to the jury of the following instructions:

“The defendant was not an insurer of the safety of the plaintiff. The plaintiff assumed all risks which he knew, or in the exercise of ordinary care should have known, were inherent in the trip; but the plaintiff did not assume any risk which was proximately caused by failure of the defendant, either before or at the time of the accident, to exercise ordinary care under the circumstances.”

Dated: February 12, 1948.

WALTER O. SCHELL,
GERALD F. H. DELAMER,
SCHELL & DELAMER,

By /s/ GERALD F. H. DELAMER,
Attorneys for Appellant, Fred
Harvey, a corporation.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Feb. 16, 1948.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PART OF
RECORD TO BE PRINTED

To the Clerk of the United States Circuit Court of
Appeals for the Ninth Circuit:

Appellant hereby designates for the printed
record the following parts of the certified transcript
of record on appeal in the above entitled matter:

1. The complaint;
2. Petition for removal to federal court;
3. Order for removal to federal court;
4. Second amended complaint;
5. Answer to amended complained filed on the
6th day of September, 1945;
6. Stipulation for pre-trial;
7. Order on pre-trial hearing;
8. Defendant's objections to instructions and
interrogatories proposed by plaintiff;
9. Instructions to jury requested by defendant;
10. Verdict;
11. Judgment;
12. Motion for new trial;
13. Notice of said motion (eliminating memoran-
dum of points and authorities in support of
said motion);
14. Order denying motion for new trial;
15. Notice of appeal;

16. Designation of record on appeal filed in the United States District Court;
17. Statement of points upon which appellant intends to rely on the appeal in this case, filed in the United States District Court;
18. Designated portions of the reporter's transcript of proceedings;
19. Order for transfer of original exhibits;
20. Certificate of Clerk of United States District Court;
21. Statement of points on appeal, filed in Circuit Court of Appeals;
22. Designation of part of record to be printed, filed in Circuit Court of Appeals.

Dated this 12th day of February, 1948.

WALTER O. SCHELL,
GERALD F. H. DELAMER,
By /s/ GERALD F. H. DELAMER,
Attorneys for Appellant Fred
Harvey, a corporation.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Feb. 16, 1948.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PART OF RECORD
REQUESTED BY APPELLEE TO BE
PRINTED

To the Clerk of the United States Circuit Court of
Appeals for the Ninth Circuit:

Appellee hereby designated for the printed record
the additional portion of the certified transcript of
record on appeal in the above entitled matter,
namely:

The designated portions of the reporter's tran-
script of the proceedings.

WALTER GOULD LINCOLN,
Attorney for Appellee.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Feb. 28, 1948.

No. 11858

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

FRED HARVEY, a corporation,

Appellant,

vs.

ELMER MATEAS,

Appellee.

OPENING BRIEF OF APPELLANT FRED
HARVEY, A CORPORATION.

FILED

APR 24 1948

PAUL E. SCHILLER
CLERK

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No. 11858

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRED HARVEY, a corporation,

Appellant,

vs.

ELMER MATEAS,

Appellee.

OPENING BRIEF OF APPELLANT FRED HARVEY, A CORPORATION.

All references are to pages of the transcript of record.

This is an appeal from a judgment rendered upon the second trial of this case. On the first trial the Court granted the defendant's motion to dismiss but its action in so doing was reversed on appeal (*Mateas v. Harvey*, 146 F. (2d) 989). Upon this second trial the jury rendered a verdict in favor of the plaintiff upon which judgment was entered.

I.

Jurisdiction.

The jurisdiction of the District Court was based upon diversity of citizenship (28 U. S. C. A., Sec. 41) and the Circuit Court of Appeals has jurisdiction to review the judgment rendered by said District Court. (28 U. S. C. A., Sec. 225.)

II.

Pleadings and Record.

The amended complaint alleges in substance [11-17] that the appellant, a New Jersey corporation, maintained a resort on the south rim of the Grand Canyon in Arizona; that it maintained two trails from said rim to its base, known respectively as the Phantom Ranch and Bright Angel trails; that it also maintained mules for the purpose of carrying passengers on the Bright Angel trail; that appellee bought and paid for a ticket for this excursion down the Bright Angel trail, informing the appellant at that time that he had never ridden a mule; that appellee, on or about June 27th, 1942, started on the excursion on mule back as a member of a party of seven; that appellee was assigned to a mule known as "Chiggers," with the position of last in a line of seven mules; that appellee did not know the previous history of that mule; that this was the first time this mule "Chiggers" had been up or down the Bright Angel trail since the previous winter.

The complaint further alleged that on the ride down the canyon his mule tried several times to squeeze past the mule in front of him on the outside of the trail; that appellee was not able to control him; that an employee of appellant had instructed appellee to hold the reins in his hand at all times, which appellee did, although the other riders did not do so; that several miles down the canyon appellee exchanged mules with an experienced rider and told appellant's employee, the guide, that appellee could

not hold the mule; that the guide required appellee to remount the same mule and proceed upon him; that the mule continued to try to pass other mules, and in about an hour started bucking and threw appellee to the ground.

The rest of the complaint alleged appellee's injuries and damages.

The answer to the second amended complaint, erroneously termed "answer to amended complaint" [17-22], admitted that appellant, a corporation, maintained the resort, but denied the remainder of the foregoing allegations. It pleaded as affirmative defenses that the accident referred to was inevitable and unavoidable in so far as appellant was concerned, and that appellee had voluntarily assumed any risk incident to riding the mule.

The case went to trial before a jury. During the course of the trial witnesses were permitted, over objection, to testify as to conversations between appellee and a Mr. Boles, which conversations were not within the hearing of any employee of appellant [122, 160-161].

The Court, at the conclusion of the evidence, instructed the jury that the appellee assumed all risks which he knew, or in the exercise of ordinary care should have known, were inherent in the trip, but that he did not assume any risk which was proximately caused by the failure of the appellant, either before or at the time of the accident, to exercise ordinary care under the circumstances [300].

The jury rendered a verdict for appellee in the sum of \$7500.00, upon which judgment was entered for appellee [45, 46-47].

III.

Statement of Facts.

Appellant concedes there is sufficient evidence to support findings of the following facts.

That appellant maintained the resort; that it advertised excursions down Bright Angel trail on faithful, sure-footed mules in charge of an experienced guide; that appellee informed appellant he had never previously ridden a mule; that appellant informed him that most of the people who made the trip were inexperienced riders; that appellee bought and paid for tickets for himself and wife for the excursion; that appellee was assigned a mule named "Chiggers"; that he started down the trail on the mule as the seventh in a line or string of seven mules led by the guide; that "Chiggers" had spent the preceding winter mostly in pasture; that this was his first trip up or down the trail since the winter; and that on the trip "Chiggers" bucked, throwing appellee to the ground and injuring him.

The appellee testified he went to the corral at the head of the trail [108]; that the trail master, Mr. Bradley, told him to take a particular mule [110-113] and to hold the reins in his hand [111, 117]; that the order of the excursion from front to rear was the guide named Bob Ennis, Mrs. Rayles, Mrs. Boles, Mrs. Mateas, appellee's wife, Mrs. Vogel, Mr. Boles and the appellee [113-114]. The trip was conducted at a walk, but appellee's mule would break into a trot or faster than a walk and try to squeeze past the other mules [127]. On the down trail Mr. Boles would grab appellee's mule by the halter or head strap and hold him back [118]. At Indian Gardens everybody dismounted for lunch and remained there about an hour [118].

Over objection, appellee testified that on the way down to Indian Gardens he and Mr. Boles spoke several times [120-121]; that Mr. Boles asked him if he had ever ridden before and appellee told him no, he had ridden burros when he was a child and nothing since then. That appellee asked Mr. Boles if he was an experienced rider; that Mr. Boles said he was practically born on a mule; that appellee told Mr. Boles he would like to get off his mule, but wouldn't expect Mr. Boles to change with him; that Mr. Boles assured him that he could handle most anything [122].

That appellee and Mr. Boles did change mules; that Bob Ennis, the guide, came along and told appellee he was on the wrong mule [119]; that appellee told Ennis he realized that; that he was afraid he couldn't handle the mule which was kind of frisky; that he wasn't an experienced rider; that Mr. Boles had offered to trade with him because he couldn't handle the mule; that Boles told the guide that appellee had a skittish mule and that his mule was perfectly safe so that he preferred to exchange with appellee, but that the guide insisted that they keep the mules they started with [122-123, 134].

Appellee's attention was called to his deposition which had been previously taken. At one place therein he testified that neither he nor Mr. Boles had said anything to the guide at Indian Gardens [131], though at other places in the deposition he testified that he had told the guide that he would like to change with Mr. Boles and that he may have mentioned that he was afraid he couldn't handle the mule because the mule was frisky and he wasn't an experienced rider [133-134].

His attention was also called to a signed statement given by him at the hospital a week or two after the accident. At this time he had recovered sufficiently to be starting to get up and to use a wheel chair, though he was still in pain [149-150]. The statement was read to him before he signed it. It reads in part:

“However, the guide noticed that the stirrups were too long and then asked us to change mules. I did not say anything to the guide that I would like to ride this mule, and I do not know if the other man said anything to the guide. I was on the mule that the man ahead of me had been riding. However, the guide noticed the change and asked us to change to the mules that we had started out with. The rider of the other mule suggested that I stay on his mule after we had made the change, because of his experience in riding.”

Appellant testified that this written statement was correct except in two particulars, one of which was in stating that there was no conversation with the guide [137-140].

He then testified that he and Mr. Boles changed back to their original mules [123]; that after leaving Indian Gardens up to the time of the accident he had no trouble with the mule; that the mule did not buck before the accident [126-129; 146-147]; that it was down hill all the way and the mules were kind of stringing out becoming further apart; that the line was getting longer; that the guide stopped his mule to allow the other mules to catch up; that they all did so and that Mr. Boles' mule stopped at a kind of ditch; that Mr. Boles kicked him in the ribs; that he started up fast to keep up with the string and that appellee's mule started up fast right behind him; that when

Mr. Boles' mule reached the end of the line he stopped as did appellee's mule, which then started bucking and continued bucking until it threw appellee over the mule's head to the ground; that this occurred about one-half to one hour after leaving Indian Gardens [123-124].

Mrs. Vogel testified that it seemed to her that the mule had bucked before they got down to Indian Gardens because it had created a commotion at least a dozen times [153]. Over objection she was also allowed to testify as to conversations which she heard between Mr. Mateas and Mr. Boles out of the hearing of the guide [156-159]. She testified that Mr. Boles said "What is the matter with that ornery mule. Does he have a bee in his bonnet?"; that Mr. Boles and appellee laughed about it and that frequently Mr. Boles tried to give appellee advice about how to handle the mule and that Mr. Boles said that maybe it would be better for appellee to get off and lead the mule [160-161].

Mrs. Mateas corroborated much of her husband's testimony [169 *et seq.*]. She also testified that when the statement was read over to appellee, the part about there having been no conversation with the guide was not read [190]; that the remainder of the statement was what appellee had told the investigator [195] and that after the statement was read to him, it was handed to appellee [196].

Mrs. Rayles testified that she heard a conversation at Indian Gardens in which appellee told the guide that the mule he rode bothered him and that he wanted to change mules with Mr. Boles, but that the guide told them that they should continue on with the mules that they originally had [202-203].

Will Wilson, a witness for the appellant, testified he was a guide on the Bright Angel trail in 1940, 1941 and 1942 and knew the mule "Chiggers" well [177]; that Chiggers was used in various positions in the string of mules wherever he happened to come, though he was more often used as a guide mule [178-179]; that they never had any trouble with "Chiggers" who was very much of a pet [179]; that it was the custom to instruct all riders to hold the reins of their mules [181-182]; that from a lead position one cannot hear conversations taking place two mules towards the rear [182-183].

John D. Bradley, witness for the appellant, testified he was the trail foreman in charge of the riding and packing animals since 1936 and his life work had been with animals, including mules [207-208]. He then described the training "Chiggers" had received [208-212].

"Chiggers" had no particular place in a string of mules [220]. It was standard practice to tell people to hold the reins, they being told to hold them in any way comfortable to themselves so long as they did not pull on the animal's mouth [224-225, 232]. There was no inflexible rule against changing mules [230]. They never had any trouble on the first trip of a mule after being out for pasture during the preceding winter [233-234].

C. Yarberry, a witness for the appellant, also testified as to the training given the mules [236-237]. He testified that he named "Chiggers" after a pet horse he had had in Texas because "Chiggers" was so gentle [236].

Robert Ennis, a witness for appellant, testified that there were four things he told the excursionist to do: Always to hold the reins; always to keep their feet in

the stirrups; to try and keep their mules as close to each other as they could; and not to get off and on their mules unless he was there to help them. That a good half of the time that they were on the trail he was turning back so that he could see the party and that when he was not doing that he was generally on a switch back where they are right in front of him as they are coming down. Consequently, he practically always was able to see them [242-243]; that he observed nothing unusual about "Chiggers" up to Indian Gardens and received no complaints [242-243]; that he was not informed at Indian Gardens or anywhere in that vicinity that there had been any trouble with "Chiggers" [244-245]; that he doesn't remember if anyone moved on a different mule before leaving Indian Gardens as that often happens [245]; that he noticed nothing unusual after leaving Indian Gardens [246], but that the mules do stay just as close together as they can, and that some will put their heads right up behind the other mules' rear ends and sometimes walk along in that fashion [246]; that he saw appellee fall off and that appellee was in the air as if he were making a dive over the mule's head. He did not observe the mule at 'this time [247].

Over the objection of appellants [287-292], the Court instructed the jury as follows [300]:

"The defendant was not an insurer of the safety of the plaintiff. The plaintiff assumed all risks which he knew, or in the exercise of ordinary care should have know, were inherent in the trip; but the plaintiff did not assume any risk which was proximately caused by failure of the defendant, either before or at the time of the accident, to exercise ordinary care under the circumstances."

IV.

Burden of Proof on Appellee.

The owner of a horse or mule hiring the same to another is not an insurer. The burden of proof is upon a plaintiff to prove that the mule was vicious and unsuitable for the purpose for which it was hired, and further, he is required to prove that the defendant knew, or by the exercise of reasonable care should have known, that fact.

Dam v. Lake, 6 Cal. (2d) 395, 57 P. (2d) 1315;

Kersten v. Young, 52 Cal. App. (2d) 1, 125 P. (2d) 501;

Heath v. Frusia, 50 Cal. App. (2d) 598, 123 P (2d) 560.

V.

Prejudicial Error in the Admission of Evidence.

The witnesses for the appellant testified at length as to the thorough training which was given the mules before they were allowed to carry excursionists down the trail. They testified that the particular mule "Chiggers" had received this training and was an especially gentle animal. There was absolutely no evidence as to any previous conduct upon the part of "Chiggers" indicating that he was unfit for the purpose of carrying excursionists.

The evidence, however, established that some time after leaving Indian Gardens "Chiggers" did buck and threw appellee to the ground.

Two main questions of fact are involved in this case: Was "Chiggers" unfit for the purpose for which he was being used and, if so, did or should appellant have known of this fact?

The only evidence in support of appellee's case is that dealing with the conduct of "Chiggers" on this particular trip prior to the time of the accident.

It was a close question as to whether this evidence was sufficient to support findings in favor of appellee on these two points. On the previous trial, with substantially similar evidence, the learned trial court felt the evidence was as a matter of law insufficient. On appeal this Court reached the contrary conclusion. One Justice, however, was of the opinion that since the case was tried before a court without a jury, the decision of the trial court should have been affirmed. (*Mateas v. Harvey*, 146 F. (2d) 989, 993-994.) The least that can be said is that the evidence would have supported a verdict and judgment for appellant.

It is, therefore, readily seen that any evidence as to how the mule acted from the time appellee got on it at the corral is extremely important, and any error committed in connection with the admission of such evidence would necessarily be highly prejudicial.

Appellee himself and Mrs. Vogel were each permitted to testify as to conversations which are claimed to have taken place between appellee and Mr. Boles, another excursionist, between the start of the trip and the arrival at Indian Gardens.

Thus appellee was allowed to testify, over objection of the appellant, as follows [121-122]:

"A. Well, he asked me if I had ever ridden before. I told him no; I had ridden burros when I was a child and nothing since then. I asked him if he was an experienced rider. He said he was practically born on a mule; he had been on a mule since he was

two years old, had been in pack trains, most everything.

This was not at one particular time. It was a little bit at particular different intervals. He offered to trade mules with me. I told him I would like to get off the mule I had but I wouldn't expect him to change with my mule. He assured me he could handle most anything. That was on the way down to Indian Gardens."

Later Mrs. Vogel was allowed to testify, again, over the objection of appellant as follows [156-162]:

"A. Well, it started at the top of the trail and Mr. Boles, one of the first things I remember was that Mr. Boles said, 'What is the matter with that ornery mule? Does he have a bee in his bonnet?'

The Court: 'Said that to whom?'

The Witness: 'He to Mr. Mateas. And I could hear everything he said, because I was in front of him.'

Q. (By Mr. Lincoln): 'Did Mr. Mateas say anything to that?' A. Oh, they just laughed about it. And then frequently Mr. Boles tried to give him advice about how to handle the mule. Mr. Boles is head of the Sierra Pack Train in the Sierras.'

.

A. Yes. I can't remember the exact conversations that took place, but I know, for one thing, they talked about maybe it would be better for him to get off and lead the mule.'

.

The Witness: 'Well, they kept kind of kidding him about the mule and—I don't know.' "

There is no evidence that these conversations were within the hearing of the guide who was the only employee of appellant with the party. On the other hand, there is testimony that from the position of the guide at the head of the line he could not have heard what was said between the riders of the two mules last in the line [182-183].

These conversations were pure hearsay as far as appellant is concerned. In so far as they related what was said by appellee, they were also self-serving declarations.

The rule against the admission of hearsay evidence is not a mere technical rule of evidence, but is based on public interest and to avoid the inherent weakness of such evidence.

Englebritson v. I. A. C., 170 Cal. 793, 797-799, 151 Pac. 421.

The rule prohibiting the admission of self-serving declarations and of evidence of conversations outside the presence of the party against whom such evidence is offered is established by a long line of cases, of which we will cite the Court to the following:

Turner v. Turner, 187 Cal. 632, 637-638, 203 Pac. 109;

Schultz v. McLean, 76 Cal. 608, 609, 18 Pac. 775;

Chapman v. Neary, 115 Cal. 79, 83, 46 Pac. 867;

Ambrose v. Hyde, 145 Cal. 555, 558-559, 79 Pac. 64;

Coulter Dry Goods v. Manford, 38 Cal. App. 231, 234, 175 Pac. 900;

Bituminized B. & T. Co. v. Simons Brick Co., 183 Cal. 687, 695-696, 192 Pac. 528.

It is true that the Court received the evidence as to these conversations to show what was said, but not as proof of the truth of what was said [121, 158]. We confess that we are at a loss to understand the ruling of the Court. What is the materiality of what was said unless the saying thereof tended to prove its truth? If the mule had been acting up during the trip, it made no difference whether or not appellee had complained to any other excursionist or whether or not any other excursionist had offered to exchange mules. If the mule was unfit to carry excursionists, recovery by appellee in nowise depends on what he said about the mule to others than to appellant's employees or what any such other person may have said to him. On the other hand, if the mule did not act up or if it was fit for the purposes for which it was to be used, no amount of complaints by appellee or remarks by third persons could affix liability on appellant.

By admitting the evidence over objection, the Court necessarily informed the jury that it had materiality, that is, that it tended to prove some fact in issue. Whether or not appellee and Mr. Boles had a conversation before reaching Indian Gardens was not a fact in issue. Therefore, the jury must have concluded that the evidence of these conversations tended to prove something beyond the mere fact of the conversations having taken place. The only thing which they could possibly conclude that the conversation tended to prove was that the mule had acted up even before it reached Indian Gardens. The jury must have understood the ruling of the Court to mean that in

arriving at their verdict upon the issues submitted to them, and if they found the conversations to have taken place, then they were to give weight to them as tending to establish the conduct of the mule on its way down the trail.

It cannot be determined what weight the jury, as a practical matter, did give to this testimony in reaching its conclusion on the controverted point as to the conduct of the mule prior to the accident. In view of the fact that the hearsay evidence and self-serving declarations thus admitted in evidence over appellant's objection bore directly on this controverted fact, one of the main issues in this case, the error in admitting the evidence must be considered prejudicial.

Nishi v. Inoguchi, 116 Cal. App. 398, 401-403, 2 P. (2d) 864;

Davis v. Robinson, 50 Cal. App. (2d) 700, 705, 125 P. (2d) 572.

VI.

Prejudicial Error in Instructing the Jury That Appellee Did Not Assume Risk Occasioned by Negligence on the Part of Appellant.

Over the objection of defendant [287-292], the Court instructed the jury as follows [300]:

“The defendant was not an insurer of the safety of the plaintiff. The plaintiff assumed all risks which he knew, or in the exercise of ordinary care should have known, were inherent in the trip; but the plaintiff did not assume any risk which was proximately caused by failure of the defendant, either before or at the time of the accident, to exercise ordinary care under the circumstances.”

This is an instruction to the effect that even though appellee may have known that appellant was negligent in furnishing him a mule which was unfit to be ridden by him upon the excursion, nevertheless, as a matter of law, appellee did not assume the risk of riding that mule even after he had an opportunity at Indian Gardens to refuse to continue to do so.

It is a well established rule of law “he who consents to an act is not harmed by it” and that a person who voluntarily continues to participate in a venture after a knowledge of its danger, whether occasioned by the negligence of another or not, cannot recover from an injury resulting from that venture.

Valencia v. San Jose, 21 Cal. App. (2d) 469, 69 P. (2d) 480;

Weiss v. Davis, 28 Cal. App. (2d) 240, 242-243, 82 P. (2d) 487, 488.

In the present case, the very foundation of appellee's claim is that before reaching Indian Gardens he knew that the mule was unsafe and that he was unable to handle it. According to appellee's theory, he protested when at Indian Gardens. Appellee does not claim that the guide then told him that the mule was safe and convinced him against his better judgment that he should continue to ride the mule. All he claims is that after having protested and told the guide that he could not handle the mule, the guide directed him to remount the mule and that he did so.

We submit that it is at least a question of fact to be determined by the jury whether or not plaintiff's conduct in so remounting the mule and continuing to ride him amounted to an assumption of risk; that appellant's requested instruction No. 27 which was refused by the Court [40] correctly states the law; and that the giving of the instruction actually given by the trial court constitutes reversible error.

VII.

Conclusion.

Wherefore, it is respectfully submitted that the trial court committed reversible error, both in the admission of the testimony of the conversations had by appellee outside the presence of hearing of any employee of appellant, and also in instructing the jury that as a matter of law appellee had not assumed the risk of continuing to ride that mule even if it had been negligence upon the part of appellant to have furnished him with that mule.

It is, therefore, respectfully submitted that the judgment in this case should be reversed.

Respectfully submitted,

WALTER O. SCHELL,

GERALD F. H. DELAMER,

Attorneys for Defendant and Appellant.

No. 11858.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

FRED HARVEY, a corporation,

Appellant,

vs.

ELMER MATEAS,

Appellee.

APPELLEE'S BRIEF.

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IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

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Appellant,

vs.

ELMER MATEAS,

Appellee.

APPELLEE'S BRIEF.

Appellee's Criticism of Appellant's Argument.

(Figures in brackets refer to pages in the printed transcript.)

Appellants synopsis of the pleadings, and such portion of the evidence which is favorable to him, is fairly correct, but has many omissions and errors which will be reviewed as we proceed.

Appellant has an error in his very first paragraph (Brief 1).

In the former case to which he refers, in which these same parties were actors, there was no motion to dismiss. On the contrary, a motion for nonsuit was granted.

Appellant's most flagrant omission is the testimony of appellee and appellee's wife as to what they heard the appellant's investigator read to them [186 to 197] when Mr. Mateas was in the hospital, suffering intense pain, a short time after the injury. The investigator asked questions, on the representation that he was doing this for the purpose of settlement [188] and that such settlement would follow shortly; he then wrote something on a paper [188]; he refused to give either Mr. Mateas, or his wife, a copy, or permit them to read this paper [188-189]; but he then read something to them, supposedly all the words which he had written. Did he? Or did he not read ALL? He is not produced! Mr. Mateas and his wife say the portion upon which appellant lays so much stress was NOT read to them; they never read the paper until it was produced in Court [186-189]. Appellant cannot then in good conscience rely upon it!

Appellant states as a proposition of law:

"The owner of a horse or mule hiring the same to another is not an insurer." (Brief 10, par. IV.)

In the immediately preceding paragraph (Brief 9) appellant objected to an instruction containing the same statement, "The defendant was not an insurer of the safety of the plaintiff."

Appellant admits this statement on one page, but objects to an instruction which embodies it ten lines before. Just where does appellant stand? Which side of the legal fence is he on—or both?

Appellant may answer that he objected to the whole instruction, and could not separate the two sentences in it. And why not? Perhaps if he had attempted to do so, the Court might have agreed with him. Since he did not do

so, and since he must accept his own objection to the whole paragraph (Brief 10) he then again contradicts the immediately following statement. Or will appellant admit that the Harvey Company was an insurer? If appellant accepts a portion of a statement by admitting it, mustn't he accept the balance—when he does protest it?

The balance of the criticised instruction is the same as the question of whether "Chiggers" was unfit for the purpose. Evidently he was.

No fit and proper mule would buck off a paying passenger, and cause a lawsuit lasting for six years!

"The only evidence in support of appellee's case is that dealing with the conduct of 'Chiggers' on this particular trip prior to the time of the accident."
(Brief 11.)

Appellant is much mistaken. Appellee is concerned also with the conduct of appellant's employees in permitting this mule, fresh from pasture, to make the trip, anyway, and compelling appellee to ride this mule, after criticism of its actions. Appellant's witnesses told with great detail the precise methods taken to toughen the mules so they would be safe to carry passengers [93, 94, 207, 210]. Appellant's brief carefully omits this (Brief 10-8).

Appellant casually refers to Bradley [207-210] but omits the equally important details given by Mr. Ennis, Sr., assistant manager of the transportation department of Harvey Company [93-94]:

"He (the mule) runs on pasture all winter without shoes. The first thing that is done is shod, and then he is put on a two-day trip, which is an easy trip. The mule is too soft to make the round trip up and down the canyon in one day; so he is put on the two day trip, and that is the way they are hardened up to the trail."

Evidently this dear little pet was too soft to make half a trip in half a *day*.

“It is a close question as to whether this evidence (Chigger’s conduct prior to the accident) was sufficient to support findings in favor of appellee on these two points” (Brief 11). What more evidence would be necessary than there is, to at least support a *prima facie* case? No one disputes the fact that “Chiggers” did not stay in line as a mule was intended to do, nor that Mr. Mateas could not handle him, nor that mules were attempted to be changed at Indian Gardens—for some reason.

Appellant thus concedes that if there was such evidence, it would be sufficient to support the judgment. “It was a close question” (Brief 11). The jury decided this “close question” adversely to him. Reviewing courts do not substitute their findings of fact for those of the jury.

“On the previous trial, with substantially similar evidence, the learned trial Court felt the evidence was, as a matter of law, insufficient” (Brief 11). Appellant is also in error in this statement. There was not “substantially similar evidence.” Neither Mrs. Vogel, nor Mrs. Rayle testified; the report of the investigator was not produced; young Ennis was not presented; no jury was present. That appeal was decided upon an entirely different law point—and was reversed.

“Any error committed in connection with the admission of such evidence (as to how the mule acted down the trail) would necessarily be highly prejudicial” (Brief 11). Not necessarily so, since, after all, the jury is concerned only with the determination as to facts. No error is charged as being committed in connection with the

admission of evidence as to how the mule acted down the trail.

In several instances it would seem that appellant argues himself out of court—so to speak.

“Any evidence as to how the mule acted from the time appellee got on it at the corral is extremely important” (Brief 11). As appellant admits that, then no conversation between Mr. Boles and Mr. Mateas, whether overheard, or reported, by Mrs. Vogel, could change the act of the mule. If the conversation did not change the actions of the mule, then it could not be vital. Mrs. Vogel testified [152-153], and Mrs. Mateas [173] also, to what they actually saw with their eyes. This could not be hearsay, nor does appellant charge that it is. He worries only about the conversations. The Court did not admit this conversation to bind the appellant [156, 157, 158, 159]. He admitted it as being an experience down the trail, just as if some member of the party had caught a butterfly.

Mrs. Mateas testifies (going down the trail):

“* * * I would notice when I would look back to see how he (Mr. Mateas) was doing, and I would notice the mule at different times try to pass the other two mules ahead of him” [173].

Mrs. Vogel testifies as to what she saw of the actions of “Chiggers” while going down the Canyon: “It appeared to me that he bucked—it caused such a commotion every time, which was at least a dozen times” [153].

Other experiences down the trail were testified to without objection; the stop for photographs [241]; the stops for rest; the stop to cinch the mules [242]; the advice (orders) given by the guide as to how the party should

conduct themselves [242]; the squeak of leather; the noise of iron hoofs on dirt and gravel.

“If the mule was unfit, * * * recovery by appellee in no wise depends on what he said about the mule to others, than to appellant’s employees, or what any of such other persons may have said to him” (Brief 11). If recovery does not depend on the conversation down the trail, then it could work no harm to appellant. How does one determine “materiality”? Isn’t this the test? “If this testimony were omitted entirely, would there be enough left without it?” If we are correct in this laymen’s definition, then we ask “If Mrs. Vogel’s testimony as to what she heard down the trail were omitted, would there be sufficient testimony left to uphold the verdict”? Since the answer is “Yes,” then why all the pother!

Appellant’s answer is (Brief 11) that by admitting this evidence, the Court gave the jury an idea that in some way (which is unexplained) the evidence was material—or tended to prove some fact in issue. Such an intelligent jury could not have received such impression from the statements carefully made by the Court several times. The Court was most careful that the jury should NOT receive the impression which appellant suggests [158, 159]. The Court received the testimony for a limited purpose only [120-121].

“The only thing which they (the jury) possibly could conclude that the conversation tended to prove, was that the mule acted up even before it reached Indian Gardens” (Brief 11). They didn’t need any more evidence than they already had from Mr. Mateas [118]; Mrs. Mateas [192, 193-172]; Mrs. Vogel’s own observations

[163] as well as theirs and Mrs. Rayles [203] testimony, of the conversations with the guide at Indian Gardens. Even he admits there was talk there about the mules. If there are several conclusions which can be reached, it is not for appellant to say that the one he prefers is the only one possible.

Appellant contradicts himself when he says "If the mule had been acting up during the trip, it made no difference whether or not appellee had complained to any other excursionist, or whether or not any other excursionist had offered to exchange mules" (Brief 14). Then again, Mrs. Vogel's report of conversations would be of no injury to appellant.

"Whether or not appellee and Mr. Boles had a conversation before reaching Indian Gardens was not a fact in issue" (Brief 14). Then why worry about the repetition of that, or any conversation? It is never possible in a trial to keep from the jury every fact of which defendant does not approve. There were many other facts which were "not in issue," yet testified to by witnesses for each of the litigants.

Appellant then tries sophistry. He is first talking about Mrs. Vogel's testimony as to conversations; then he uses this as inclusive in his term "any evidence," and then—basing his conclusion on a false premise and incorrect arguments,—he propounds this heavy conclusion, "any error connected with the admission of such evidence (that is, any evidence as to how the mule acted—not any evidence as to what Mrs. Vogel heard) is prejudicial." This reasoning is vicious, unless discovered and commented upon.

Robert Ennis, the guide, did not testify that he did not hear this conversation on the trail. He half-heartedly

says he didn't "Hear anybody making any complaint about the manners of Chiggers" [243]. He had never used "Chiggers" before [240].

Mr. Wilson and Mr. Ennis [102] also say that "Chiggers" was more often used as a guide mule—he was so sweet, and gentle and kind, and loving, and like a pet! [99-179]. In that case, it was even more careless for appellant's employees to place this mule as last in line on his first day after pasture. As men with many years' experience in the peculiarities of mule nature—they knew—or should have known, what "Chiggers" reaction would be when given a place in the rear, when he had been so often in the lead. Such ignominy would meet with only one result—his mulelike desire to acquire his more normal, customary place in the front of the line, from which he had been demoted—and on his very first day, too!! He'd "show 'em." He would get to the front, and if they wouldn't recognize his rights, he would get rid of his incubus. If this was just an ordinary plow mule, you couldn't give it credit for such intellect—but—according to the praise of appellant's witnesses, they wouldn't be surprised if "Chiggers" talked—of course, in a soft, melodious voice!

"The jury must have understood the ruling of the Court to mean that in arriving at their verdict upon the issues submitted to them, and if they found the conversations to have taken place, then they were to give weight to them as tending to establish the conduct of the mule on its way down the trail" (Brief 14, 15). How can anyone determine whether or not any particular evidence makes an impression upon a jury? The appellee has just as much right to argue that the jury did not consider this conversation at all, in arriving at their verdict; that they

did not need to, as there was plenty of evidence before them on which their verdict could be based, and on which this Court would uphold it.

All appellant's witnesses (except the physicians) were employees, or former employees for many years, of the Harvey Company. Their testimony was most naturally influenced by this relationship.

Mr. Wilson, brought here from Alameda by appellant, says that from a lead position he could not hear conversations taking place two miles from the rear. He was talking about a string of ten mules, which is his usual [182] and customary number [183]. He did not say, nor did anyone say, that the guide could not hear conversations only five miles back. Nor was he talking about this occasion. Mr. Mateas was and is a very deaf man, carrying with him at all times a necessary hearing aid [102-103]. Therefore it is necessary to speak much louder to him than it is to ordinary persons. There was no noise in the canyon—except the squeak of the leather and the slither of the hoofs of the mules [182]. These were ordinary, customary and expected sounds to the guide. This Court will take judicial notice that a person does not usually take special notice of those sounds to which he is accustomed, or which he expects. The ear will ignore them. He will, however, notice sounds which are out of the ordinary, or unexpected. Therefore, it was most natural that the guide could, and probably did hear this conversation which must have been carried on in a very loud tone by Mr. Boles.

The guide says he did not remember the talks at Indian Gardens about "Chiggers" actions, and Mr. Mateas' fear, but probably the jury did not believe him. His answer was not a very convincing one [244].

Appellant's authorities are not helpful to his contentions:

“However, irrespective of the question of evidence, it is well settled that the giving of correct instructions upon an abstract proposition of law not entirely applicable to the circumstances of a particular case does not warrant a reversal unless it clearly appears that the jury was misled thereby to the prejudice of the appealing party.

And in the present case, even though it be assumed that the evidence above narrated was not enough to warrant the giving of the two instructions under consideration, Appellants have not suggested any facts, nor presented any argument to show that the jury was misled thereby to appellant's prejudice.”

Valencia v. San Jose. 21 Cal. App. (2d) 469, 475.

Nor is *Weiss v. Davis*, 28 Cal. App. (2d) 240, of value to appellant.

The contention was there raised that by plaintiff's implied consent to the excessive speed of the auto in which he was riding, he thereby assumed all risk of injury. The Court there said:

“that contention is too broad” (at p. 243). “* * * Granting that the plaintiff assumed the risk of traveling 75 miles per hour, there is nothing in the record showing he assumed the additional risks just mentioned above.”

Weiss v. Davis, 28 Cal. App. (2d) 240, 244.

So with us. If it could be said that Mr. Mateas assumed the risk of the acts of the mule *before* Indian Gar-

dens, he certainly did *not* assume the greater risk of being bucked off—a risk of which he had no warning—certainly not from appellant.

He was entitled to obey the instructions of the guide. Wasn't the guide competent? Then when he ordered that appellee *must* remount "Chiggers," he impliedly said the mule was as safe as appellee had been led to believe when he read the alluring advertisement about the surefooted animals taking thousands down this same trail "in safety." [Pltf. Ex. 1-P.]

Appellant evidently takes the position that appellee should not have ridden "Chiggers" again after the party arrived at Indian Gardens. What else would he do? Walk back? Or be left there? He must do one or the other—or else remount his mule.

He must obey the guide.

"He (Bob) said we were all to ride the mules we started with [163]. Bob said I had to keep the mule I started with * * * Ennis said we couldn't do it (change mules) [122]. We had to remain on the mules we started with [123]. The guide made him change mules [193]. Mr. Ennis made them resume their own mounts" [203].

"Mrs. Vogel: I heard Bob Ennis tell him to get back on his own mule, on the mule he rode.

The Court: Tell who?

The Witness: He told—he told Mr. Boles to ride his mule and Mr. Mateas to ride his mule.

Q. What, if anything did Mr. Boles answer?

A. Well, he said that he was afraid that Mr. Mateas' mule would buck, and that being that he knew how to handle mules better, why, he thought he should ride him.

Q. Well, what did Bob say to that? A. He said that we were all to ride the mules we started with" [163].

Mrs. Mateas overheard a conversation between Mr. Boles and Bob (Ennis) at Indian Gardens:

"I overheard Mr. Boles say that the reason they had changed mules was that my husband's mule was constantly trying to pass the other mules and get ahead of them and that he was a skittish mule and my husband was afraid of the mule, and that he thought or he knew he could ride the mule and it would be a better idea for my husband to ride his mule, Mr. Boles' mule" [174].

Mr. Mateas testifies:

"Bob said I had to keep the mule I started with. Mr. Boles told him that I had a skittish mule and that his mule was a perfectly safe mule, and he preferred to trade over. And Ennis insisted we couldn't do it [122]. We had to remain on the mules we started with" [123].

Mrs. Mateas testifies:

"Bob (the guide) told him (Mr. Mateas) at that time that we had to remain on the mules we were assigned at the top of the hill [174]. They then changed back [174]. This was when my husband was on the other mule [192]. The guide made him change mules" [193].

Mrs. Rayle testifies: I overheard Mr. Boles talk to the guide at Indian Gardens [202] "that the mule Mr. Mateas rode bothered him, and Mr. Boles wanted to change with him, and they did that at Mr. Boles' suggestion [203]. Mr. Ennis made them resume their own mounts" [203].

Mrs. Vogel evidently “hit the nail on the head” when, during cross-examination:

“Q. Have you discussed this matter with anybody before coming into Court? A. Well, I have told dozens of people about the injustice of it * * *

Q. You are interested in the outcome, are you not? A. Well, only as a matter of justice.”

(A man was seriously injured, through no fault nor desire of his own, in June 1942. We are now nearing June 1948—nearly six years—and the defendant still refuses to recognize any duty owed to customers.)

Appellee now refers this Court to the position taken by appellant during the course of counsel’s argument with the trial court concerning the settlement of the proposed jury instructions [250 to 308]. Both sides had submitted their respective endeavors, but the trial Court, more learned than counsel, was careful, and kind enough, to write his own [254].

“The Court: The law raises the implied warranty, if nothing had been said [252].

Mr. Lincoln: Yes * * *

Mr. Schell: I think so. That would be implied warranty Your Honor just outlined.

The Court: Do you gentlemen view this transaction a hiring of personal property?

Mr. Schell: Yes, or renting * * *

Mr. Lincoln: It seems to me so, yes Sir [253].

* * * * *

The Court: * * * I have come to the conclusion that express warranty here does not contain any greater content than implied warranty * * * [256].

Mr. Schell: I think I see nothing in the first nine (to criticize) * * *

Mr. Lincoln: I had no criticism of all of them * * *” [257].

Mr. Schell was satisfied with instructions 1 to 11 [262]; No. 12 [264], No. 13 [265], No. 14 [266], No. 15 [266], No. 16 [266], No. 17 [267], No. 18 [268], No. 19 [269], No. 20 [269], Nos. 21 to 35 [269, 270], but desired his proposed No. 27 to be included [270 to 273].

* * * * *

“The Court: Your instruction No. 27 is based upon the assumption that if he knows of a risk he assumes it, even though it may be caused by a breach of warranty.

Mr. Schell: I think this is a standard instruction on the assumption of risk, this 27 and 28.

The Court: I think the case you put [288] the question would be one of contributory negligence and not assumption of risk, because it presupposes negligence of the defendant.

Mr. Schell: Yes, it presupposes [289] * * *.”

* * * * *

“The Court: That is where the assumption of risk would blend into your contributory negligence.

Mr. Schell: Yes, there is a very fine line of demarcation where one starts and the other stops. It is very difficult.

The Court: If the risk, caused by certain negligence of the defendant, had proceeded for such a long time it was part of the inherent nature of the undertaking” [291].

* * * * *

The Court: Do you gentlemen have any further suggestions or comments with respect to the intended instructions now?

Mr. Schell: Not any more. * * *

Mr. Lincoln: I have none; no, Sir" [295].

* * * * *

The Court: * * * Has the defendant any exceptions to note on the record with respect to the instructions thus far given?

Mr. Schell: No, Your Honor, except the instruction on the—the assumption of risk * * * in other words he assumed any risk, even though that risk might have been caused by the defendant provided that plaintiff knew [307].

The Court: That an act or omission of the defendant might have gone on for a sufficient period of time back to prove the inherent risk of the enterprise [307-308].

Mr. Schell: That is correct.

The Court: And have been known, of course, to the plaintiff, or, in the exercise of due care, he should have known. That is your contention?

Mr. Schell: That is my contention, yes. * * *

The Court: I have in mind your contention on that. I think that is the law, but I do not see any application of it to this case" [308].

Cases cited by appellant (Brief 10) are livery stable cases, about which the trial Court said: "It is not the usual livery stable hiring of animals because of the control which the defendant had over the animal."

Summary of Appellant's Brief.

Appellant's position seems to be:

(1) That it was improper to admit Mrs. Vogel's report of conversations which she heard—assuming that they were not in the hearing of defendant.

Appellee answers:

These conversations must have been loud enough to be heard by defendant's employee; even if they were not—their admission was not necessary to convince, or even influence, the jury.

(2) Appellee assumed every risk which ever could be thought of in connection with riding a mule; particularly the risk of being bucked off after rest at Indian Gardens, or any other time.

Appellee answers:

He was entitled to rely upon (a) the written warranty [Pltf. Ex. 1-P, p. 106] which was the condition precedent to his ride; (b) he was compelled by positive orders from appellant's employee to place himself in a position which he could not have known to be dangerous (because of his lack of experience in riding mules), and which that same employee should have known to be dangerous—because of his many years of knowledge of mule nature, his experience with mules, and (most important) statements made to him of the mule's antics and appellee's fear; (c) it is evident the mule had not been sufficiently toughened that season, as required, to privilege it to carry dudes.

Appellee's Position as to the Law Involved.

- (a) *This Was a Jury Trial During Which There Was a Conflict of Evidence. That Conflict the Jury Resolved in Favor of Appellee.*

"All conflicts must be resolved to support the verdict, and in favor of the implied findings of the jury—since it is the sole judge of the credibility of the evidence and the weight of the evidence * * * in determining whether a judgment must be reversed because of errors in instructions, we are required to examine the entire cause including the evidence and decide whether in our opinion the errors HAVE resulted in a miscarriage of justice."

Hobart v. Hobart, 28 Cal. (2d) 412, 447.

"Whether the evidence is clear and convincing must be determined by the trial Court and this Court must accept the determination as conclusive if there is substantial evidence to support it."

Baines v. Zuieback, 84 A. C. A. 609, 614;

Stromerson v. Averill, 22 Cal. (2d) 808, 815.

Even if the trial Court did err in admitting the testimony of Mrs. Vogel, such error was of no consequence:

"The general rule prevailing in California on this subject is this:

"Where there is competent evidence in the record which supports the judgment without recourse to the testimony erroneously offered, generally the error is not prejudicial, as it will be presumed on appeal that the trial Judge considered and relied upon the competent evidence in making his findings and rendering the judgment."

Keating v. Basich, 66 Cal. App. (2d) 258, 263, and cases there cited.

- (b) *One Assumes Such Risks as Are Natural and Expected in an Enterprise—but Not Those Which He Could Not Foresee, nor From Which He Had Received a Written Warranty of Safety.*

“While a person assumes the perils which are naturally incident to the position he takes—yet he does not assume dangers which can come only from the negligent acts of another.”

Hedding v. Parsons, 76 A. C. A. 578;

46 Cal. App. (2d) 404;

65 Cal. App. 249;

65 Cal. App. (2d) 729;

59 Cal. App. (2d) 1, 9;

41 Cal. App. (2d) 664, 668.

Much of the argument and law which appellee could here present, has been read by this Court in briefs filed in the first appeal in this same case when this appellee was then the appellant (case No. 10783). To these, appellee respectfully refers this Court, in order that he may not be too repetitious; particularly the reply brief of appellant there (appellee here).

Respectfully submitted,

WALTER GOULD LINCOLN,

Attorney for Appellee.

No. 11858.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRED HARVEY, a corporation,

Appellant,

vs.

ELMER MATEAS,

Appellee.

REPLY BRIEF OF APPELLANT FRED
HARVEY, A CORPORATION.

FILED

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REPLY BRIEF OF APPELLANT FRED HARVEY, A CORPORATION.

On re-reading Appellant's Opening Brief for the purpose of preparing this Brief, we observe that through inadvertence a formal Specification of Errors was omitted from the Opening Brief. We, therefore, respectfully ask permission of this Court to supply said Specifications of Errors herewith.

I.

Specification of Errors.

Appellant specifies as errors, requiring a reversal of the judgment in this case, the following:

Specification 1. Error upon the part of the trial court in admitting in evidence the testimony of the plain-

tiff with regard to a conversation not shown to have been within the hearing of any employee of the defendant, which conversation was that on the way down to Indian Gardens he and Mr. Boles spoke several times [120-121]; that Mr. Boles asked him if he had ever ridden before and appellee told him no; he had ridden burros when he was a child and nothing since then; that appellee asked Mr. Boles if he was an experienced rider; that Mr. Boles said he was practically born on a mule; that appellee told Mr. Boles he would like to get off his mule, but wouldn't expect Mr. Boles to exchange with him; that Mr. Boles assured him he could handle most anything [122].

The grounds of objection urged upon the trial were:

Appellee testified [119-120] that the guide Bob Ennis came along and told appellee that appellee was on the wrong mule [121]. Appellee was then asked whether either he or Mr. Boles said anything to the guide at that time. He answered:

“A. Yes, sir. Mr. Boles and I spoke about it on the way down. We had some slight conversation to the effect that I was a green rider—

Mr. Schell: Just a moment.

A. —and he was an experienced rider.”

Mr. Schell, counsel for appellant, then made the following motion [120]:

“Mr. Schell: I move to strike out any conversation between this witness and Mr. Boles, without the presence of this defendant and hearsay.”

The motion was overruled [120].

Appellee was then asked further questions with regard to the conversation with Mr. Boles, to which the following objections were made [120-121]:

“Mr. Schell: May I have the same objection, your Honor, that it is incompetent, irrelevant and immaterial, hearsay, not within the issues, and would be purely hearsay, not part of the *res gestae*.

The Court: Is that the same question you are just repeating?

Mr. Lincoln: That is the same question; yes, sir.

Mr. Schell: To keep the record straight, he has re-asked the question and I have to repeat my objection.

The Court: Yes; I understand. Your objection will be overruled, and the evidence received for the limited purpose stated, namely, to show it was in fact said, and not the truth of what was said. You may relate the conversation.”

Argument upon this specification is found under heading V of the Opening Brief, pages 10-15, and heading II of this brief.

Specification 2. Error upon the part of the trial court in admitting in evidence the testimony of Mrs. Vogel as to conversations which she heard between Mr. Mateas and Mr. Boles, which conversations were not shown to have been within the hearing of any employee of the defendant and were that Mr. Boles said “What is the matter with that ornery mule. Does he have a bee in his bonnet?”; that frequently Mr. Boles tried to give appellee advice as to how to handle the mule; and that Mr. Boles said maybe it would be better for appellee to get off and lead the mule [160-161].

Upon the asking of the first of the questions with regard to this conversation, the following objection was interposed [156]:

“Mr. Schell: Just a moment. That is objected to, if the court please, as incompetent, irrelevant and immaterial, and pure hearsay in so far as this defendant is concerned.

The Court: The question is merely directed to whether or not there was conversation. The objection is overruled. The answer may stand.”

The objection was overruled.

Upon the asking of the next question with regard to said conversation, the following objections and statements were made [156-157]:

“Mr. Schell: The same objection, your Honor.

* * * * * * * *

Mr. Schell: As to that, if the court please, it would not in any way be binding on these defendants, because it would be purely hearsay as to them.”

The objection was overruled.

Upon the asking of the next question with regard to the conversation, the following objection was made [159]:

“Mr. Schell: If the court please—might it be stipulated, counsel, that my objection goes to this entire line of conversation?”

The court then stated [159]:

“The Court: Yes. Well, it is understood that your objection heretofore made goes to any part of the conversation that occurred outside of the presence of any representative of the defendant; and the

jury is to understand that any conversation that occurred outside of the presence of a representative of the defendant is admitted solely for the purpose of evidence of what was said, and not evidence as to the truth of what was said.”

Argument upon this specification is found under heading V of the Opening Brief, pages 10-15, and heading II of this brief.

Specification 3. The court committed error in instructing the jury as follows [300]:

“The defendant was not an insurer of the safety of the plaintiff. The plaintiff assumed all risks which he knew, or in the exercise of ordinary care should have known, were inherent in the trip; but the plaintiff did not assume any risk which was proximately caused by failure of the defendant, either before or at the time of the accident, to exercise ordinary care under the circumstances.”

The objections made to the foregoing instruction were as follows [288]:

“Mr. Schell: I do not agree on the fact that the assumption of risk is necessarily limited or is not applicable to the acts of the defendant which the plaintiff should have known.”

And again [290]:

“Mr. Schell: Well, possibly that is the distinction. But I think, once he knew that the risk was inherent or was there, and he continued to act, that is a question of fact whether or not he either assumed the risk or was guilty of contributory negligence.”

And again [307-308]:

“Has the defendant any exceptions to note on the record with respect to the instructions thus far given?

Mr. Schell: No, your Honor, except the instruction on the—I don’t remember whether it is necessary to note an exception on the instructions nowadays—but the instruction on the assumption of risk, as I pointed out before, I feel it was broader—in other words, he assumed any risk, even though that risk might have been caused by the defendant, provided that plaintiff knew.

The Court: That refers back to our discussion the other day?

Mr. Schell: That refers back to our discussion.

The Court: That an act or omission of the defendant might have gone on for a sufficient period of time back to prove the inherent risk of the enterprise?

Mr. Schell: That is correct.

The Court: And have been known, of course, to the plaintiff, or, in the exercise of due care, he should have known. That is your contention?

Mr. Schell: That is my contention, yes.”

Argument upon this specification is found under heading VI of the Opening brief, pages 16-17, and under heading II of this Brief.

II.

Errors in the Admission of Evidence.

Appellee makes two claims with respect to the admission in evidence of the conversations between himself and Mr. Boles:

1. That no error was committed because the conversations took place within the hearing of the guide, an employee of appellant.

2. That apart from these conversations there was sufficient evidence to support the verdict of the jury and that, therefore, the reception of the evidence of these conversations was not prejudicial.

In fact, there is no evidence that these conversations were within the hearing of the guide, the only employee of appellant anywhere in the vicinity. Appellee's argument is merely that since he was deaf, he probably spoke in a loud voice and that as this was not a usual noise incident to the trip, the guide probably overheard what was said. This, however, is pure speculation. On the other hand, there is the testimony of Mr. Wilson that from the position of the guide at the head of the line, the guide could not have heard what was said between the riders of the two mules last in line [182-183].

When a conversation, in which a party to an action does not participate, is offered in evidence, the burden is upon the one so offering it to establish that it actually was heard or within the hearing of the adverse party.

Thus it is said in 22 *C. J.* (Evidence), Section 358, p. 324:

“The mere fact that the party was within hearing distance of the speaker, is not sufficient unless the

situation was such that he must necessarily have heard.”

In *Joseph v. Furnish*, 27 Ore. 260, 41 Pac. 424, 426, the Court said:

“The subsequent questions herein noted as put to the witness Brown, and his answers thereto, were, therefore, incompetent, and ought not to have been admitted, and likewise other questions and answers of the same nature. The same observation will apply to the like character of testimony elicited from the witnesses Park and Carter. The conversation which Park relates that he had with Wilkinson took place within 12 feet of the plaintiff, but around the corner of a vault, and out of his sight, and Park could not swear that he did or could have heard the conversation. Hence plaintiff could not be bound by Wilkinson’s admissions, unless it was shown that he heard them, and had an opportunity of correcting any statement inconsistent with the facts as they existed.”

No witness testified that the guide either heard or even could have heard the conversations between appellee and Mr. Boles. Their admission in evidence was, therefore, error.

By far the greater portion of appellee’s Brief is devoted to a statement of the evidence favorable to appellee’s contentions, and appellee appears to criticize us for not having set forth this evidence in full in our Opening Brief.

It must be remembered that this appeal is not based upon the insufficiency of the evidence to sustain the verdict or judgment. We, therefore, confined our statement of facts to a summary of the evidence sufficient to show

two things: (1) That the conversation so admitted and the instruction given concerned vital issues in the case, namely, the conduct of the mule and of appellee, and (2) That there was a sharp conflict in the evidence on these issues.

The admission of incompetent evidence upon a vital issue on which there is a conflict is necessarily prejudicial since it may well be that it was this incompetent evidence which induced the jury to resolve that conflict one way or the other.

In addition to the cases cited by us on page 15 of our Opening Brief, we would refer the court on this point to the following authorities:

In *Anderson v. Hagen*, 19 Cal. App. (2d) 714, 726, 66 P. (2d) 168, 175, the court says:

“The determinative issue at the trial was whether the stock had been pledged, as Anderson testified, or whether it had been endorsed, as Hagen stated, simply to make more expeditious a possible sale of Weber Company. Upon this issue Mrs. Hagen was called as a witness, although she had no part in the transaction with Anderson other than to endorse the certificate at her husband’s direction, and over timely and proper objection she was permitted to testify, in response to the question: ‘What was told you at the time that it was signed by you? . . . A. My husband handed it to me asked me to sign it and I asked him why he wanted me to, and he said Major wanted us to sign them, and he said that Major was worried about his affairs, and that he has plans in his head that probably that he might plan to sell to Cherry & Burrell and that was all I knew about those plans, and he said that he thought we should cooperate with Major and that we certainly could trust his

judgment, and I felt the same way about Major, and I signed it, and was perfectly happy to sign it.’

The question called for and received an answer which, on the matter in dispute, was clearly hearsay, a statement the purport of which was an explanation of the nature and purpose of the deposit of the stock. Because the evidence on this vital point was in direct conflict, the error of admitting this testimony cannot be said to be without prejudice.”

Certainly the evidence received in the case at bar was just as incompetent as the evidence referred to in the cited case and, likewise, it cannot be said not to have resulted in prejudice to appellant.

In *Grace v. Carpenter*, 42 Cal. App. (2d) 301, 303, 108 P. (2d) 701, 702, the court says:

“It follows, therefore, that in an action such as the instant one evidence as to the husband’s earnings and as to other community property, with the one possible exception above noted, would be irrelevant, and having been here received by the court it must be assumed that such evidence was taken into account in the court’s determination of the issues involved. The error in admitting such evidence is necessarily prejudicial.”

In our Opening Brief, page 14, we asked what was the materiality of what was said between Mr. Boles and appellee unless the saying thereof tendered to prove its truth. We further pointed out that whether or not appellee and Mr. Boles had a conversation before reaching Indian Gardens, was not itself a fact in issue, and that, therefore, the jury must have concluded that the evidence of these conversations tended to prove something beyond the mere

fact that they took place. We pointed out that the jury must, therefore, have understood that they were to give some weight to the conversations as tending to establish the conduct of the mule on the way down the trail.

Appellee's answer is found on pages 6 and 7 of the Reply Brief and consists of the statement that such an intelligent jury could not have received the impression that by admitting this evidence the Court intended to convey the idea that the evidence was material or tended to prove some fact in issue. Appellee, however, fails to state what other impression the jury could have received from the fact that, over objection, the trial court admitted the evidence. We submit that the one and only impression that the jury could possibly have received was that the evidence was material and did tend to prove a fact in issue, namely, the conduct of the mule on the way down the trail prior to its arrival at Indian Gardens.

Again appellee, on page 8, referring to our contention that the jury must have given some weight to the evidence, says:

“How can anyone determine whether or not any particular evidence makes an impression upon a jury? The Appellee has just as much right to argue that the jury did not consider this conversation at all, in arriving at their verdict”

We submit that the conclusive presumption is that arriving at their verdict, the jury did consider all matters admitted in evidence before them.

It is, therefore, respectfully submitted that the admission of the evidence of these conversations was not only erroneous, but was prejudicial and requires a reversal of the judgment.

III.

Error in the Instructions to the Jury.

We confess that we find it very difficult to follow appellee's argument upon this point. Appellee says, page 2, Reply Brief, that we assert that the owner of a horse or mule, hiring it to another, is not an insurer. We do so assert. Appellee then continues that because we objected to an instruction containing this language, we are on both sides of the fence. It is true that we did object to such an instruction containing this statement, but the objection was limited to that part hereof which stated that the plaintiff did not assume any risk proximately caused by negligence upon the part of the defendant. Appellee continues that had we merely objected to this latter part of the instruction, the court might have agreed with us. This is precisely what defendant's counsel did do. The objection was solely and specifically to that latter part of the instruction [288, 290; 307-308]. Apparently we did exactly what appellee would have us do.

Appellee then says, page 3, Reply Brief, "if appellant accepts a portion of a statement by admitting it, mustn't he accept the balance—when he does protest it?" It is certainly a novel proposition that one accepts the whole of a statement because he agrees with part thereof and protests against the rest.

Appellee continues, page 3, Reply Brief, "the balance of the criticized instruction is the same as the question of whether 'Chiggers' was unfit for the purpose." We do not understand what appellee means. The balance of the criticized instruction dealt with the question of the assumption of risk by the plaintiff if, in fact, the mule were not fit for the purpose for which it was hired.

Appellee then, on page 3, refers to the testimony of Mr. Ennis, that when a mule has been on pasture all winter without shoes, he is too soft to make the round trip up and down the Canyon in one day, so that he is put on a two day trip. Appellee then draws the remarkable conclusion from this testimony that “Chiggers” was too soft to make half a trip in half a day. We utterly fail to see how this would follow from Mr. Ennis’ testimony.

Appellee then says, on page 4, Reply Brief, that no one disputes the fact that “Chiggers” did not stay in line as a mule was intended to do, nor that Mr. Mateas could not handle it, nor that mules were attempted to be changed at Indian Gardens—for some reason.

There appears to be no doubt but that Mr. Mateas did get upon Mr. Boles’ mule at Indian Gardens. However, we emphatically dispute that “Chiggers” did not stay in line as he was intended to do, or that Mr. Mateas could not handle him. Even if the testimony of appellee was sufficient to support a finding that “Chiggers” did not stay in line and that appellee could not handle him, nevertheless Robert Ennis, the guide, testified that at practically all times coming down the trail he could see the entire party and that he observed nothing unusual about “Chiggers” up to Indian Gardens and received no complaints about him there. He further testified that after leaving Indian Gardens he noticed nothing unusual about the mule, but that the mules do stay as close together as they can, and that some will put their heads right up behind the other mules’ rear ends and sometimes walk along in that fashion [242-243, 246].

Apparently appellee’s next reference to the criticized instruction commences on page 10 of the Reply Brief where appellee argues that he did not assume any risk.

Since it was appellee's own testimony that before reaching Indian Gardens he knew that the mule was unsafe and that he was unable to handle it, the question was one of fact for the determination of the jury as to whether or not by continuing on that mule after Indian Gardens, appellee had assumed the risk incident thereto.

The trial court instructed the jury that as a matter of law appellee had not assumed that risk if the original furnishing of the mule to him amounted to negligence upon the part of appellant.

On the other hand, it is our contention that even though the furnishing of the mule amounted to negligence, if appellee, with full knowledge of the danger of riding that mule, nevertheless, continued on the mule after he had an opportunity to refuse so to do, then he assumed the risk incidental thereto.

It is our contention that the cause of the danger, whether due to negligence or not, becomes immaterial as soon as the person exposed to that risk becomes aware of its existence and has an opportunity to avoid it. We submit that where a person voluntarily continues to submit himself to a known danger, he cannot excuse his conduct on the ground that that known danger had been caused by the negligence of another.

Finally appellee says, page 16, Reply Brief, that our position is that "he assumed every risk which ever could be thought of in connection with riding a mule; particularly the risk of being bucked off after rest at Indian Gardens, or any other time."

Of course, this is not our position. We do not claim that appellee assumed any risk except those risks of which

he had or should have had knowledge. It is further our position that it was a question for the jury to have decided whether or not by the time he reached Indian Gardens appellee had knowledge of sufficient facts so that he must be considered as having assumed the risk incident to proceeding further on the particular mule.

We submit that the instruction given by the trial court was erroneous and that had it not been given, then the jury might well have returned a different verdict. Therefore, we submit that the giving of this instruction constituted prejudicial error.

IV.

Conclusion.

We again respectfully submit that the trial court committed reversible error in the admission of the testimony of the conversations between appellee and Mr. Boles not shown to have been within the hearing of any employee of appellant.

We also submit that the trial court committed reversible error in instructing the jury that appellee did not assume any risk which was proximately caused by negligence on the part of the defendant.

It is, therefore, submitted that the judgment in this case should be reversed.

Respectfully submitted,

WALTER O. SCHELL,

GERALD F. H. DELAMER,

Attorneys for Defendant and Appellant.

No. 11859

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.

HOBART E. KEITH and LOUISE E. KEITH,
His Wife,
Appellees.

Transcript of Record

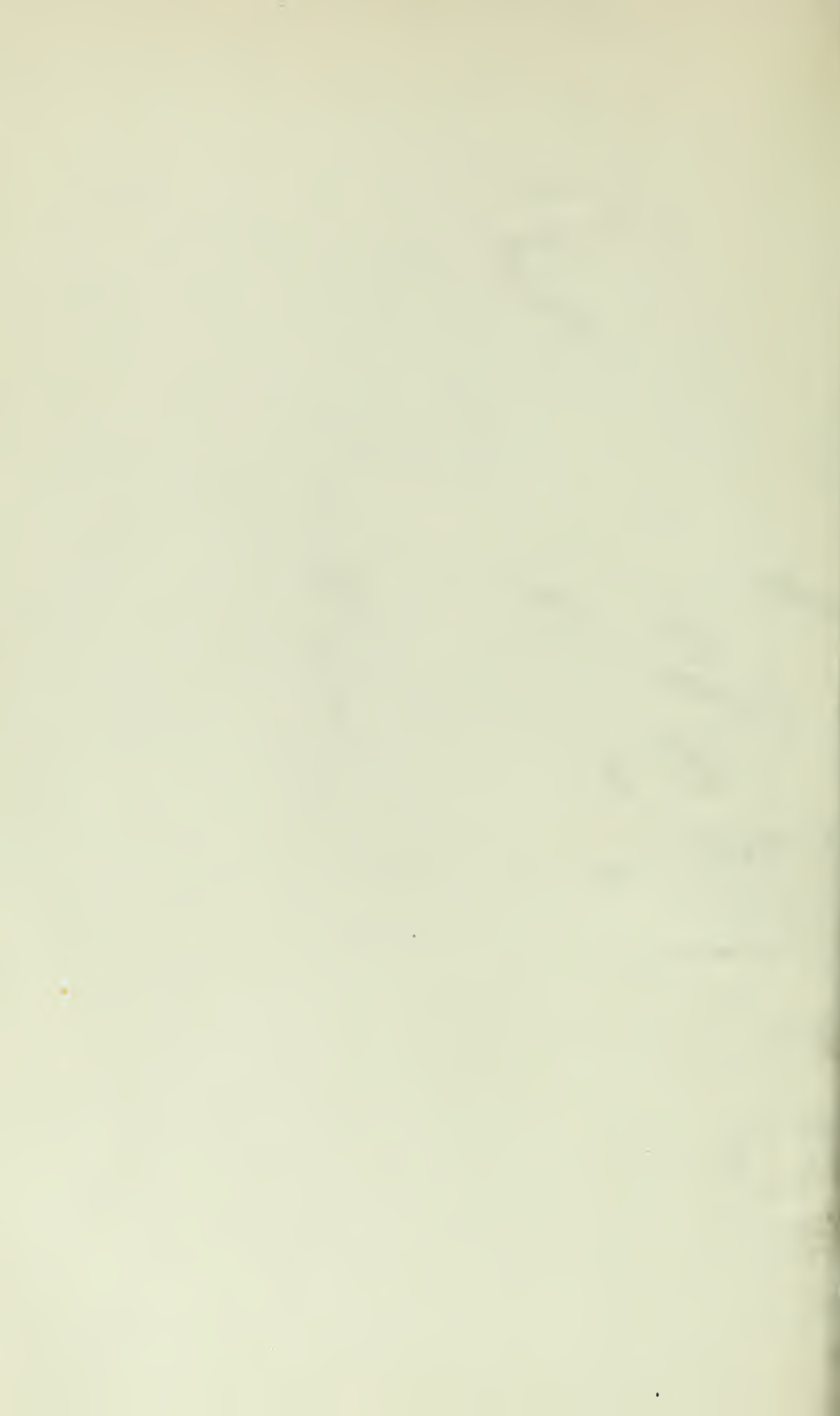
Upon Appeal from the District Court of the United States
for the Western District of Washington,
Southern Division

FILED

APR 27 1948

PAUL P. O'BRIEN,

CLERK



No.11859

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,

vs.

HOBART E. KEITH and LOUISE E. KEITH,
His Wife,
Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Southern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

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United States Attorney.

GUY A. B. DOVELL, ESQ.,
Assistant United States Attorney,
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Tacoma, Washington,
Attorneys for Defendant,
United States of America.

In the District Court of the United States for the
Western District of Washington, Southern
Division

No. 1006

HOBART E. KEITH and LOUISE E. KEITH,
His Wife,

Plaintiffs,

vs.

THE GOVERNMENT OF THE UNITED
STATES OF AMERICA, Doing Business
Through a Sub-Agency Known as the PUB-
LIC ROADS ADMINISTRATION, FED-
ERAL WORKS AGENCY, DIVISION 8, and
FRANK MORSE and JANE DOE MORSE,
His Wife,

Defendants.

COMPLAINT

Comes Now the plaintiffs and for cause of action
against the defendants herein, allege as follows:

I.

That the plaintiffs were and are residents of the
State of Washington, residing near Poulsbo, and
on the date of the collision hereinafter referred
to, were, and now are the owners of a Ford V-8
automobile involved in said collision hereinafter
described. That the defendant, Frank Morse, was
on the 9th day of July, 1946, an employee of the

United States of America, working for the Public Roads Administration of the Federal Works Agency and was at the time of the collision hereinafter referred to, the driver of the car which struck the plaintiffs' car and that the said Frank Morse was at the time of the accident, on active duty and working under the direction of the said Federal Works Agency, Division 8, and was driving the equipment of the Federal Government, carrying Government property, and doing Government business.

II.

That this action is brought under the Federal Torts Claims Act, Title 4, Legislative Re-Organization Act of 1946, Public Laws No. 601 of the 79th Congress, Second Session, approved August 2, 1946, and that in accordance with the provisions of said act the plaintiffs duly presented their claim to the appropriate Federal Agency hereinbefore referred to, and said claim was presented on November 8, 1946. A copy of said claim is attached hereto marked Exhibit A, and made part of the complaint set forth herein. The claim was refused by the Agency and returned to the plaintiffs. That subsequent thereto the plaintiffs herein filed with the United States Department of Justice, Washington, D. C., a copy of the claim of the plaintiffs herein, and receipt of the same was acknowledged by John F. Sonnett, Assistant Attorney General, as of December 16, 1946.

III.

That on January 7, 1947, in accordance with the Federal Statute, the plaintiffs herein notified W. H. Lynch, Division Engineer for the Public Roads Administration of the Federal Works Agency at his regular office in Portland, Oregon, and likewise notified John F. Sonnett, Assistant Attorney General, United States Department of Justice, Washington, D. C., that they were withdrawing the claim in order that suit might be instituted thereon after the expiration of the fifteen days' notice. That both notices were sent by Registered mail and more than fifteen days have elapsed since said notice. That in the notice, the Agency and the Attorney General were notified that the claim was in all particulars as previously outlined, with the one exception that the claim was increased to Thirty Thousand Dollars (\$30,000), because of Hobart E. Keith's slow recovery, and pain and suffering.

IV.

That on or about July 9, 1946, the plaintiffs were proceeding south of Chehalis, Washington, on the Pacific Highway between Toledo and Chehalis, and at a point which is commonly known as Mary's Corner, where the National Park Highway enters the said Pacific Arterial Highway and forms a T therewith, the plaintiffs' automobile was struck by a car of the United States, driven by the defendant,

Frank Morse, as agent for the United States as more fully appears previously in this complaint.

V.

That at said time and place the plaintiff, Hobart E. Keith, was driving plaintiffs' automobile north toward Chehalis and was on the Pacific Highway which is an arterial highway. The said plaintiff was driving on his right-hand side of the road and had a trailer attached to his car and was driving in a careful, prudent, and legal manner. The car driven by the defendant, Frank Morse, struck the car and trailer driven by the plaintiff, on the right hand side; said car of Frank Morse proceeding in westerly direction off from the National Park Highway and on to the Pacific Highway. That said collision was caused to the negligent and unlawful action of said defendant, Frank Morse, as follows:

1. That the defendant, Frank Morse, entered the Pacific Highway without stopping, although the street was well marked with stop signs, contrary to the laws of the State of Washington.

2. That the defendant, Frank Morse, was driving at an excessive rate of speed estimated in excess of 35 miles per hour.

3. In deliberately striking, when he saw, or should have seen the car and trailer of the plaintiff which was in plain view of the defendant, Frank Morse.

4. In failing to yield right-of-way to the car upon the arterial highway and driving upon his left or wrong side of the Pacific Highway, and driving into and upon the car of the plaintiffs.

5. In failing to make a proper turn from the said National Park Highway, and going upon the Pacific Highway; said turn being improper in that it placed the defendant's car upon the east side of the highway as he was going south.

6. In failing to keep a lookout for users of the highway; in particular the plaintiffs herein.

7. In failing to apply his brakes, when he saw, or should have seen that he was about to strike the car and trailer of the plaintiffs herein.

That all of said negligence herein set forth was the sole and proximate cause of the striking of the two automobiles.

VI.

That as a direct result of said striking of the plaintiffs' car by the defendant's car as above set out, the plaintiffs' car was damaged in that the market value immediately after said collision was the sum of \$660.00 less than the market value before the collision; the depreciation in value being due to said collision.

That the personal property of the plaintiffs in the sum of \$934.00 was destroyed.

That the earning capacity of the plaintiff, Hobart E. Keith, was the sum of \$216.80 per month after all deductions for income tax, social security, and other necessary reductions were made; that as a result of said accident, the plaintiff will lose at least nine months' working time or the sum of \$1951.20.

That doctor bills have been paid in the sum of \$214.90. That the plaintiff, Hobart E. Keith, was removed to the Naval Hospital in Bremerton, Washington, where it is understood that there will be no charge for future doctor and hospital bills.

That as a result of said collision, Hobart E. Keith was severely injured; he lost two fingers from the left hand and the left wrist became severely mangled, all of which is very painful and caused considerable suffering and required numerous operations and skin draftings, the full extent of which has not yet been determined; and caused pain, suffering, and permanent injury in the sum of \$30,000.00.

That the future earning capacity of the plaintiff has been effected in the estimate amount of \$7500.00.

VII.

That the plaintiff suffered severe shock and embarrassment, and it has left him in a nervous condition, all his nerves upset, upset stomach, sleep restless, all as a result of said collision.

Wherefore, the plaintiff prays for judgment against the defendants, and each of them, and the

community composed of Frank Morse and Jane Doe Morse, his wife, in the sum of \$30,000.00; for general pain, suffering, and special damages in the sum of \$11260.10; all in a total sum of \$41,260.10.

MARION GARLAND,

A. J. HUTTON,

Attorneys for Plaintiffs.

State of Washington,
County of Kitsap—ss.

Hobart E. Keith and Louise E. Keith, his wife, being first duly sworn, on oath depose and state: That they are the plaintiffs in the above-entitled action; that they have heard read the foregoing Complaint, know the contents thereof, and believe the same to be true.

HOBART E. KEITH,

LOUISE E. KEITH.

Subscribed and Sworn to Before Me this 11th day of February, 1947.

[Seal]

A. J. HUTTON,

Notary Public in and for the State of Washington,
Residing at Bremerton.

EXHIBIT A

CLAIM OF HOBART E. KEITH AND LOUISE
E. KEITH, HIS WIFE

On or about July 9, 1946, at what is known as Mary's Corner, just south of Chehalis, Washington, the undersigned were driving north in their car with a load of domestic goods, and with their three children, ages eleven, thirteen, and sixteen, when Frank Morse, being then and there in the employ of the United States Government, Public Roads Administration, Federal Works Agency, Division 8, Post Office Building, Portland 8, Oregon, in broad daylight, drove onto the arterial highway from a side road, coming presumably from Packwood, Washington, and without warning, drove into the car occupied by the undersigned claimants and their family; and on account of said action, the undersigned have been damaged to the following extent, as more fully hereinafter set out, and for which they now make claim against the Federal Government, all under Federal Torts Claims Act, Title 4, Legislative Re-organization Act of 1946, Public Law No. 601, 79th Congress, Second Session, approved August 2, 1946:

Personal property destroyed.....	\$ 1,594.00
Damage to Automobile	660.00
	Net
Nine months' loss of time, earning capacity \$216.80 per mo.	1,951.20
Doctors' bills	214.90

These were the preliminary doctors' bills. The main doctor and hospital bills have been supplied at the Naval Hospital, Bremerton, for which we understand there will be no charge.

Pain and Suffering	7,500.00
Numerous operations and skin graftings have been required. The claimant was a carpenter by trade. He lost two fingers of the left hand, the wrist does not as yet move, and there will be a deformity of the wrist, which was mashed severely.	
Loss of earning capacity.....	7,500.00
<hr/>	
Total Claim	\$19,420.10
Damage to automobile is included in first item above	660.00
<hr/>	
	\$18,760.10

Dated this 7th day of November, A.D. 1946.

HOBART E. KEITH,
LOUISE E. KEITH,
Claimants.

Subscribed and Sworn to before me this 7th day of November, A.D. 1946.

A. J. HUTTON,
Notary Public in and for the State of Washington,
Residing at Bremerton.

Copy received this day of November, 1946.
W. H. LYNCH,
Division Engineer, Public Roads Administration,
Federal Works Agency, Division 8, Post Office
Building, Portland 8, Oregon.

By

[Endorsed]: Filed Feb. 21, 1947.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, United States of America, and for its answer to plaintiffs' complaint alleges as follows:

First Defense

That Plaintiffs' said complaint and bill of particulars fail to state a claim against this defendant upon which the relief prayed for can be granted.

Second Defense

I.

That defendant United States of America admits the allegations contained in paragraphs numbered I, III and IV of said complaint.

II.

Answering Paragraph II of said complaint, this defendant admits that a copy of the claim, a copy of which is thereto attached, was presented to the Federal Agency here involved, but denies that the same was presented in accordance with the provisions of the Federal Torts Claims Act, or that the amount of the claim so presented or thereafter noted at time of withdrawal as alleged in Paragraph III of said complaint was in the extensive sum now claimed in this action.

III.

Answering Paragraph V of said complaint, this defendant admits that plaintiffs' automobile, with trailer, was at the time and place alleged proceeding on the arterial highway as designated in the direction alleged and that at such time and place

defendant's vehicle was being driven by its employee, Frank Morse, onto said arterial highway, but denies that said employee was driving at an excessive speed or that said driver deliberately struck, or that he saw or should have seen the car and trailer of the plaintiffs, or that the same was in the plain view of said driver of the government vehicle; and in this connection the defendant alleges that due to the sun in the west shining against the windshield of defendant's car at the time of day involved that its said driver became partially blinded, thereby and was rendered unable to see the plaintiffs' approaching car at the time he proceeded to drive defendant's car onto said arterial highway, resulting in collision with plaintiffs' car.

IV.

Defendant denies each and every allegation contained in Paragraphs numbered VI and VII of Plaintiffs' complaint, and particularly denies that the Plaintiffs or either of them, have been damaged in the sum of \$41,260.10 or in any other sum whatsoever.

Wherefore, having fully answered defendant, United States of America, prays that Plaintiffs take nothing by its complaint herein; that the same be dismissed, and that it may go hence with its costs and disbursements, to be taxed herein as provided by law.

/s/ J. CHARLES DENNIS,

United States Attorney.

/s/ GUY A. B. DOVELL,

Asst. United States Attorney.

[Endorsed]: Filed June 9, 1947.

[Title of District Court and Cause.]

ORDER

This matter coming on for hearing in open court upon the motion of defendants Frank Morse and Jane Doe Morse, his wife, appearing by and through Thomas H. Tongue, III, one of their attorneys, plaintiff appearing by and through Marion Garland, his attorney, and the United States appearing by and through J. Charles Dennis, U. S. Attorney, and Guy A. B. Dovell, Assistant U. S. Attorney, and the matter having been argued by counsel and good and sufficient reasons appearing therefor, it is hereby

Ordered that the complaint in the above-entitled action be and it is hereby dismissed, insofar as said complaint prays for relief against defendants Frank Morse and Jane Doe Morse, his wife.

Dated this 12th day of May, 1947.

/s/ CHARLES H. LEAVY,
U. S. District Judge.

Approved as to form:

/s/ MARION GARLAND JR.,
Of Attorneys for Plaintiffs.

/s/ GUY A. B. DOVELL,
Asst. U. S. Attorney.

Presented by:

THOMAS H. TONGUE,
Attorney for Deft. Morse.

[Endorsed]: Filed May 12, 1947.

[Title of District Court and Cause.]

REPLY

Comes Now the plaintiffs and in reply to the defendants' answer, admit, deny, and allege:

I.

Deny the first offense as set forth in the answer of the United States Government.

II.

In reply to the second offense, plaintiffs allege affirmatively that the procedure set forth in the statute in the presentation of claims was followed particularly and substantially as more fully set forth in the complaint of the plaintiffs.

III.

In reply to Paragraph III, they deny same and allege affirmatively that the same does not state a defense to the plaintiff's complaint.

Wherefore, plaintiffs pray: That the defendant's answer be set aside and held for naught, and the plaintiffs be given judgment as prayed for in their complaint.

/s/ MARION GARLAND,

/s/ A. J. HUTTON,

Attorneys for Plaintiffs.

State of Washington,
County of Kitsap—ss.

Hobart E. Keith and Louise E. Keith, being first duly sworn on oath, each for himself states: That he is one of the plaintiffs in the above-entitled action; that he has read the foregoing Reply, knows the contents thereof, and believes the same to be true.

/s/ HOBART E. KEITH,
/s/ LOUISE E. KEITH.

Subscribed and Sworn to before me this 26th day of June, 1947.

[Seal] /s/ A. J. HUTTON,
Notary Public in and for the State of Washington,
Residing at Bremerton.

Copy received June 30, 1947.

GUY A. B. DOVELL,
Asst. U. S. Attorney.

[Endorsed]: Filed June 30, 1947.

[Title of District Court and Cause.]

PRETRIAL ORDER

As the result of pretrial conferences heretofore had whereat the plaintiff was represented by Arthur Hutton and Marion Garland, Jr., and the defendant, United States of America, by J. Charles Dennis, United States Attorney for this district and

Guy A. B. Dovell, Assistant United States Attorney, attorneys of record whereupon the following issues of fact were framed and exhibits identified:

Admitted Facts

The following are the admitted facts herein:

1. The Plaintiffs' complaint, paragraphs I, II, III and IV are admitted and paragraph V is admitted, as qualified by the defendants' answer.

Plaintiffs' Contentions

Plaintiffs' contentions are as follows:

1. The only question to be decided is the question of damages to be decided by the Court.

Defendant's Contentions

Defendant's contentions are as follows:

1. Defendant contends the only question of fact is for the Court to decide the matter of damages, the Court having a question of law as to whether or not the sun in one's eyes is excuse for going through an arterial, as set forth in the pleadings:

Issues of Fact

The following are issues of fact to be determined by the Court:

1. The amount of damage the plaintiff, Hobart E. Keith, received.

Issues of Law

The following are the issues of law to be determined by the court:

1. The only issue of law is whether or not sun in one's eyes is excuse for going through a stop light.

Exhibits

The exhibits to be presented at the time of the trial will be the doctor bill in the sum of \$214.90, and the doctor and hospital records from the U. S. Naval Hospital at Bremerton, Washington, also the records of the Puget Sound Naval Shipyard, Keyport Torpedo Station, pertaining to the work record of the plaintiff, these exhibits to be used for both the plaintiff and the defendant and to be entered by stipulation.

Attorneys' Stipulation

It is stipulated by the attorneys of record that the question of damage shall be proven as follows:

1. That the records of the Puget Sound Naval Hospital at Bremerton, Washington, will be subpoenaed, and a competent doctor designated by the Naval Hospital Commander who is familiar with the case, shall also be subpoenaed, together with any and all other records pertaining to the plaintiff's physical condition; also, the plaintiff agrees to hold himself available for inspection by any other doctor the government may suggest at any time before trial, and that the plaintiff shall have the right

to have the medical testimony of one doctor other than herein designated.

It is further stipulated that the loss or damage of personal items shall be proven by the testimony of the plaintiffs and that the pain and suffering and other items of personal damage shall be limited to testimony of the plaintiffs and their immediate families.

Action of the Court

The foregoing pretrial order has been approved by the parties hereto, as evidenced by the signatures of their counsel hereon, and this Order is hereby entered, as a result of which the pleadings pass out of the case, and this pretrial order shall not be amended except by agreement of the parties to prevent manifest injustice.

Dated at Tacoma, Washington, this 13th day of August, 1947.

/s/ CHARLES H. LEAVY,

United States District Judge.

Form Approved Provided approved by Government and we are notified before August 20, 1947.

/s/ A. J. HUTTON,

/s/ MARION GARLAND JR.,

Counsel for Plaintiffs.

/s/ J. CHARLES DENNIS,

United States Attorney.

/s/ GUY A. B. DOVELL,

Assistant United States Attorney, Counsel for the Defendant, United States of America.

[Endorsed]: Filed Sept. 13, 1947.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Matter coming on regularly to be heard before me on the 18th and 19th days of September, 1947; the plaintiffs being present in Court and represented by their attorneys, Arthur J. Hutton and Marion Garland, Jr.; the defendant, United States of America, being represented by its attorney, Harry Sager; the court having heard the testimony of witnesses and the argument of counsel and having announced its Findings orally, does hereby make the following

FINDINGS OF FACT

I.

That the plaintiffs were and are residents of the State of Washington, residing near Poulsbo, and on the date of the collision hereinafter referred to were, and now are, the owners of a Ford V-8 automobile involved in said collision hereinafter described. That the defendant, Frank Morse, was on the 9th day of July, 1946, an employee of the United States of America, working for the Public Roads Administration of the Federal Works Agency, and was at the time of the collision hereinafter referred to, the driver of the car which struck the plaintiffs' car and that the said Frank Morse was, at the time of the accident, on active duty and working under

the direction of the said Federal Works Agency, Division 8, and was driving the equipment of the Federal Government, carrying Government property, and doing Government business.

II.

That this action is brought under the Federal Torts Claims Act, Title 4, Legislative Re-Organization Act of 1946, Public Laws No. 601 of the 79th Congress, Second Session, approved August 2, 1946, and that in accordance with the provisions of said Act the plaintiffs duly presented their claim to the appropriate Federal Agency hereinbefore referred to, and said claim was presented on November 8, 1946. That said claim was duly rejected as provided by law and that as stipulated by the United States Attorneys and incorporated in the Pretrial Order, all procedural matters for bringing said matter to court were done according to law.

III.

That on or about July 9, 1946, the plaintiffs were proceeding south of Chehalis, Washington, on the Pacific Highway between Toledo and Chehalis, and at a point which is commonly known as Mary's Corner, where the National Park Highway enters the said Pacific Arterial Highway and forms a T therewith, the said Plaintiffs' automobile was struck by a car of the United States driven by the defendant, Frank Morse, as Agent for the United States.

IV.

That at said time and place the plaintiff, Hobart E. Keith, was driving plaintiffs' automobile north toward Chehalis and was on the Pacific Highway which is an arterial highway. The said plaintiff was driving on his right-hand side of the road and had a trailer attached to his car and was driving in a careful, prudent and legal manner. The car driven by the defendant, Frank Morse, struck the car and trailer driven by the plaintiff, on the right hand side; said car of Frank Morse proceeding in westerly direction off from the National Park Highway and onto the Pacific Highway. That said collision was caused to the negligent and unlawful action of the said defendant, Frank Morse, as follows:

1. That the defendant, Frank Morse, entered the Pacific Highway without stopping, although the street was well marked with stop signs, contrary to the laws of the State of Washington;
2. In failing to keep a lookout for users of the highway, in particular the plaintiffs herein;
3. In failing to apply his brakes, when he saw, or should have seen, that he was about to strike the car and trailer of the plaintiffs herein.

That all of said negligence herein set forth was the sole and proximate cause of the striking of the two automobiles.

V.

That as a direct result of said striking of the plaintiffs' car by the defendant's car as above set forth, the plaintiffs' car and personal effects were damaged in the total sum of seven hundred and fifty (\$750.00) dollars; that the plaintiff, Hobart E. Keith's, left arm was mangled causing him damage in the further and following amounts: Loss of earnings on behalf of the *defendant*, Hobart E. Keith, both past and future, in the sum of five thousand (\$5000.00) dollars (said \$5000.00 exclusive of compensation due plaintiff for other United States services); the said Hobart E. Keith will need medical care, which he cannot receive from the United States Government under any of his present preferences, in the sum of seven hundred fifty (\$750.00) dollars and that the *defendants* are further damaged in general damages for shock, pain, embarrassment, suffering, disfigurement, maiming and all other injury in the sum of nine thousand, six hundred (\$9,600.00) dollars or in a total amount of sixteen thousand, one hundred (\$16,100.00) dollars.

VI.

That the sum of fifteen (15%) per cent of the total damage done the plaintiffs is a reasonable sum to allow A. J. Hutton and Marion Garland, Jr., as attorney's fees.

Done in Open Court this 6th day of Oct., 1947.

/s/ CHARLES H. LEAVY,
U. S. District Judge.

From the foregoing Findings of Fact the Court makes the following:

CONCLUSIONS OF LAW

I.

That the defendant, United States of America, has damaged the plaintiffs in the sum of sixteen thousand, one hundred (\$16,100.00) dollars for which the plaintiffs are entitled to judgment, together with Court costs, as provided by law.

II.

That the sum of fifteen per cent (15%) of the total judgment, or the sum of two thousand, four hundred and fifteen (\$2,415.00) dollars, should be allowed as attorneys fees unto Marion Garland, Jr., and Arthur J. Hutton, same to be paid from the damages as received by the plaintiffs.

Done in Open Court this 6th day of Oct., 1947.

/s/ CHARLES H. LEAVY,
U. S. District Judge.

10/6/47

Defendant excepts to the foregoing Findings and Conclusions of Law and exceptions allowed.

/s/ CHARLES H. LEAVY,
U. S. District Judge.

[Endorsed]: Filed Oct. 6, 1947.

In the District Court of the United States for the
Western District of Washington, Southern
Division

No. 1006—Tacoma

HOBART E. KEITH and LOUISE E. KEITH,
His Wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA d/b Through
a Sub-Agency Known as the PUBLIC ROADS
ADMINISTRATION, FEDERAL WORKS
AGENCY, DIVISION 8; and FRANK
MORSE and JANE DOE MORSE, His Wife,
Defendants.

JUDGMENT

This Matter having come on regularly to be heard before me on the 18th and 19th of September, 1947; the plaintiffs being present in Court and represented by their attorneys, A. J. Hutton and Marion Garland, Jr.; the defendant, United States of America, being represented by its attorney, Harry Sager; the court having heard the testimony of witnesses and the argument of counsel; having made its Findings of Fact and Conclusions of Law and being fully advised in the premises; it is hereby

Ordered, Adjudged and Decreed that the plaintiffs have judgment against the defendant, United States

of America, in the sum of Sixteen Thousand, One Hundred (\$16,100.00) Dollars, together with costs, as provided by law, in the sum of \$62.80, making a total judgment in the sum of \$16,162.80.

(\$).

It is further

Ordered, Adjudged and Decreed that the plaintiffs' attorneys, A. J. Hutton and Marion Garland, Jr., receive from the plaintiffs the sum of fifteen per cent (15%) of their total judgment as attorney's fees, or the sum of Two Thousand, Four Hundred and Fifteen (\$2,415.00) Dollars; same to be paid from the moneys received on this judgment.

Done in Open Court this 6th day of October, 1947.

CHARLES H. LEAVY,
U. S. District Judge.

10/6/47.

Defendant excepts to the foregoing Judgment and exceptions allowed.

CHARLES H. LEAVY.

Judgment entered on Civil Docket VI, Oct. 6, 1947.

[Endorsed]: Filed Oct. 6, 1947.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given That the United States of America, the defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on October 6, 1947, in favor of the plaintiffs in said action, and against the said defendant, the United States of America; and from the whole thereof.

Dated this 2nd day of January, 1948.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ GUY A. B. DOVELL,
Assistant United States
Attorney.

Attorneys for Appellant, United States of America.
Address: 324 Federal Building, Tacoma 2,
Washington.

Copy of the foregoing Notice of Appeal mailed to Messrs. Marion Garland, Jr., and A. J. Hutton, Attorneys for Plaintiffs, at Dietz Building, Bremerton, Wash., this 2nd day of January, 1948.

E. E. REDMAYNE,
Deputy Clerk.

[Endorsed]: Filed Jan. 2, 1948.

[Title of District Court and Cause.]

STATEMENT OF POINTS

The following is a statement of points on which appellant intends to rely on appeal.

1. That the District Court, in rendering judgment for plaintiffs, erred in allowing attorney's fees in addition to an award of damages, and in entering judgment in the aggregate amount including the allowance for attorney's fees.
2. That the judgment of the District Court is excessive in the sum of \$2100.00, the amount of the attorney's fees allowed in addition to the amount of damages awarded to the plaintiffs.

Dated this 21st day of January, 1948.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ GUY A. B. DOVELL,
Assistant United States
Attorney.

Received a copy of the within statement of points this 26th day of January, 1948.

/s/ MARION GARLAND, JR.,
/s/ A. J. HUTTON,
Attorneys for Plaintiffs.

[Endorsed]: Filed Jan. 27, 1948.

[Title of District Court and Cause.]

DEFENDANT'S DESIGNATION OF RECORD
ON APPEAL

To the Clerk of the above-entitled court:

The defendant United States of America, herewith designates the following portions of the record and proceedings to be contained in the record on appeal:

1. Complaint.
2. Answer.
3. Order entered May 12, 1947, dismissing individual defendants.
4. Reply.
5. Pre-trial Order.
6. Findings of Fact and Conclusions of Law.
7. Judgment.
8. Transcript of court's Oral Opinion.
9. Notice of Appeal.
10. Statement of Points.
11. This Designation.

Dated this 21st day of January, 1948.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ GUY A. B. DOVELL,
Assistant United States
Attorney.

Received a copy of the within designation this
26th day of January, 1948.

/s/ MARION GARLAND, JR.,
/s/ A. J. HUTTON,
Attorneys for Plaintiffs.

[Endorsed]: Filed Jan. 27, 1948.

[Title of District Court and Cause.]

PLAINTIFFS' DESIGNATION OF CONTENTS
OF RECORD ON APPEAL

To the Clerk of the above-entitled court:

The Plaintiffs, Hobart E. Keith and Louise E. Keith, herewith, in addition to the designation of the contents of record set forth by the defendant, United States of America, through a sub-agency known as the Public Roads Administration, Federal Works Agency, Division 8, designates the following portions of the record and proceedings to be contained in the record on appeal:

1. An enlargement of Designations Nos. 6 and 7 of the defendants, by supplementing the same with the statement of counsel for the respective parties and all comments of the Court at the time of signing the Judgment.

Dated this 31st day of January, 1948.

/s/ A. J. HUTTON,

/s/ MARION GARLAND, JR.,

Attorneys for Plaintiffs.

Received a copy of the within designation this
2nd day of February, 1948.

/s/ J. CHARLES DENNIS,

United States Attorney.

/s/ GUY A. B. DOVELL,

Assistant United States
Attorney.

[Endorsed]: Filed Feb. 2, 1948.

[Title of District Court and Cause.]

RE-STATEMENT OF POINTS

The following is a re-statement of the points to be considered on appeal:

1. Was the Court correct in his decision that at any time before signing the Findings and Conclusions of Law and Judgment, it was not only his right, but his duty, to consider the entire record and law in determining the amount of damages that should be awarded the plaintiffs.

Dated this 31st day of January, 1948.

/s/ A. J. HUTTON,

/s/ MARION GARLAND, JR.,

Attorneys for Plaintiffs.

Received a copy of the within re-statement of points this 2nd day of February, 1948.

J. CHARLES DENNIS,

/s/ GUY A. B. DOVELL,

Attorneys for Defendant,

United States of America.

[Endorsed]: Filed Feb. 2, 1948.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO TRANSCRIPT
OF THE RECORD ON APPEAL

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing Transcript, consisting of pages numbered 1 to 29, inclusive, together with the original Reporter's Transcript of the Court's oral Opinion (after trial), consisting of pages numbered 1 to 18, inclusive, and original Reporter's Transcript of Proceedings (of October 6, 1947), consisting of pages numbered 1 to 10, inclusive, is a full, true and correct record of so much of the papers and proceedings in Cause No. 1006, Hobart E. Keith and Louise E. Keith, his wife, Plaintiffs, vs. The Government of the United States of America, doing business through a sub-agency known as the Public Roads Administration, Federal Works Agency, Division 8, and Frank Morse and Jane Doe Morse, his wife, Defendants, as required by the Designation of the Contents of the Record on Appeal of the defendant United States of America, and the additional Designation of the Plaintiffs, now on file and of record in my office at Tacoma, Washington, and the same constitute the complete Record on Appeal from the Judgment of the District Court of the United States for the Western District of Washington, Southern Division, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the original Reporter's Transcripts, above referred to, have this day been transmitted to the United States Circuit Court of Appeals at San Francisco.

I further certify that the following is a full, true and correct statement of all expenses, fees and charges earned by me in the preparation of the aforesaid Record on Appeal, to-wit:

Appeal fee.....	\$ 5.00
Clerk's fee for preparation of Record on Appeal	8.50
	<hr/>
	\$13.50

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court, in the City of Tacoma, in the Western District of Washington, this 13th day of February, 1948.

[Seal] MILLARD P. THOMAS,
Clerk.

By /s/ E. E. REDMAYNE,
Deputy.

In the District Court of the United States for the
Western District of Washington, Southern
Division

No. 1006

HOBART E. KEITH, et ux.,

Plaintiffs,

vs.

GOVERNMENT OF THE UNITED STATES OF
AMERICA, Doing Business Through PUBLIC
ROADS ADMINISTRATION, FEDERAL
WORKS AGENCY, and FRANK MORSE,
et ux.,

Defendants.

TRANSCRIPT OF COURT'S ORAL OPINION
(After Trial, Sept. 19, 1947)

The Court: This accident, the first of its nature that this Court has had to concern itself with since the enactment of this Federal Torts Claims Act, and conclusions that we arrive at cannot be based therefore upon any previous experience that we have had along those lines.

In determining what award should be made in a case of this nature, I think it is appropriate to take into consideration the history and background that gives rise to this legislation. The legislation itself is not an independent enactment, but it is only a part of the general reorganization act of Congress passed by the 79th Congress, and it is made a part of that act. I think part three and possibly four, in the whole act.

The plaintiff in this case, as every other citizen and person, had no right of action at all against the United States until this law became effective. The only relief so far as an injured person would have against the Government until the effective date of this law, was by filing a claim in—with the Congress. That in turn was submitted to the Claims Committee, and it was either allowed or disallowed. Those claims had their origin in both houses of Congress. The reorganization act abolished the Claims Committee. One of the arguments for the abolition of these committees in the respective houses, was that the awards made were frequently entirely out of line with what would have been just and fair. In some instances they were terribly exaggerated; in others they were greatly minimized; then in others with great merit, they were totally disallowed. Because the Legislative Branch of the Government had and has so many obligations and duties, they could give but a very limited consideration to claims against the Government, and the successful prosecution of a claim depended largely upon the Member of Congress who sponsored it and his presentation of it. It was presented *ex parte* and rather informally.

In order to relieve Congress of this terrific burden, and to assure a higher degree of justice, the provisions were made whereby the agency involved itself, if there was a minor loss, could determine what it should be, up to a thousand dollars. If there was a loss that went beyond that, the Federal District Courts were given jurisdiction. Action was

to be treated as an action at law, though in fact it is not such, because an action at law would entitle the plaintiff to a trial by jury.

The law makes other restrictions, such as denying the injured person a right of action against the individual or individuals who were directly and proximately the cause of their injury and damage. By instituting an action such as the plaintiff has here, he has waived and lost his right to sue the individual who operated the Government vehicle.

I mention those things because the approach to fixing damages must be somewhat different from that in an ordinary tort action where the amount of damage is fixed either by the jury or the Court.

In this case there is no question of the negligence at all, and no issue of contributory negligence. In fact, the Government saw fit not to offer any evidence whatever that would be even remotely extenuating, and the evidence as disclosed here is that it could not well have done so. The accident clearly was one of not even ordinary negligence or failure to do what a careful and prudent person would have done under the same or similar circumstances, but it was the grossest kind of negligence on the part of the operator of the Government vehicle.

It is true that the pretrial order recites that it is the contention of the defendant that the operator of this vehicle was driving with the sunlight in his eyes, but the evidence is undisputed here that he disregarded the entrance on an arterial highway which was well marked with warning signs and a stop sign, and I would have no hesitancy in finding

if there were an issue made, that he came through that stop sign without stopping, because he would not have been able to have struck the plaintiff's car with the force and violence that he did, which was sufficient to turn his own car half way around and head it back in the direction in which it came. So he must have gone through that stop sign. The fact that the sun was shining in his eyes is a matter that was, of course, not in his control, but called for a high degree of vigilance and care, just as fog would, or rain would, or anything else. The evidence indicates clearly that he did not exercise even the most ordinary care under the existing circumstances.

The miracle of the whole situation is that all of these people were not severely injured or some of them killed. But happily and fortunately for the wife and the three children in the car, they apparently were not hurt at all, or not sufficient to justify them in presenting any claim.

The plaintiff, Keith, did suffer severe injuries. The Government has made no effort to minimize it. It has been extremely fair in presentation of the matter in cross-examining witnesses called by the plaintiff. He made a remarkable recovery physically, and from what medical testimony we have there are possibilities of recurrency by—some time in the future suffering from an osteomyelitis, I think they designated it, that might result in an amputation of the arm, but those are speculative and I shall not take them into consideration in measuring the damages.

The plaintiff gives every indication of suffering mentally or psychologically, whatever would be the proper term to designate a mental condition. The doctor that he called here, who is an expert in that field, states that there is substantial reason to believe that with a proper personal relationship and a sufficient degree of confidence on the part of the plaintiff, Keith, with his physician, within a year's time he ought to be well along toward the road to recovery from this existing mental condition, which is due, in part, to his age and in part to this accident.

I am inclined to feel and believe, and shall make an award for allowing a sum that will grant him treatment along psychiatric lines in connection with his present condition. One who suffers from a mental state cannot be judged by the rest of us very well, or not nearly so well as we could if it were a physical condition, nor if it were an objective symptom as distinguished from a subjective symptom. We might be inclined to suspicion malingering. One might be inclined to believe that this is a case, where after an award was made and a collection of damages was had, that there would be a rapid recovery from the mental state.

I do not feel that such is the situation in this case. I watched the plaintiff quite closely in the courtroom and on the witness stand, and I am of the opinion that, to him his troubles are real, though to his physicians and probably others they would appear to be a type of psychosis or nervous-

ness. Probably psychosis is a little too strong a word. Psycho-neurotic, I think, is the term that the doctors use. For that reason, I feel there should be some award made that will allow for treatment.

Now as to the nature of the disability, it is undisputed that his disability in this left hand and arm is at least ninety per cent and permanent. The evidence is quite convincing that he never again can follow his occupation as a carpenter. He might direct carpenter activity, and he might do some minor carpenter work, but he is left now with a thumb and two fingers on his left hand, with wrist permanently damaged and even the forearm damaged. My recollection of the testimony is that he can't bring his second finger in contact with this thumb at all after almost a year and a half, and the same is generally true of the first finger, so he couldn't hold a nail, couldn't do many of those things that a carpenter would have to do.

The amount of an award that can be made for that type of permanent injury is one that is difficult because we have no definite standard to go by. The State of Washington, as I tried to hurriedly check up, or have my law clerk check, allows a maximum of thirty-six hundred dollars for the loss of an arm, or use of an arm, as a permanent partial disability and final settlement for such loss.

That he has lost a considerable amount of earning and will continue to, at least for a period somewhere from nine months to a year from this date, there is no question. His earnings were in the

neighborhood of eleven dollars and eighty cents a day, subject to certain deductions. That loss began about December the first, 1946, or late in November, when he had used his sick leave and his permanent leave. It could be argued, and probably the Court would be inclined to instruct the jury if they were measuring damages, or would himself if this were an action against a private individual, approach it from a somewhat different angle, that he sustained a loss from the date of the accident to the end of the period when he drew his wages as sick leave and accumulated leave, which would have to be compensated for because he had earned this time. But in a case of this nature, where the Government is the pay for the wages, and where the Government would become the judgment debtor, I think the approach should be made from the date when he ceased to draw wages, up to a time when he probably can gainfully employ himself again. And it is upon that basis that I shall make my calculation.

Now, as to the loss of personal property and damage to the automobile, I shall generally accept the automobile value based upon—or loss based upon the value that the son, who at one time had an interest in it, fixed, which was four hundred and fifty dollars. The O.P.A. price at that time, if it had been sold at ceiling price immediately preceding the accident, was possibly eight hundred and fifty dollars.

And as to the personal property involved, I feel that the value has been greatly overestimated by Mrs. Keith. It couldn't be fixed by what it would cost to go out and buy it new, and yet it's undisputed that the little trailer was a total loss and likewise a good part of the personal property, bedstead, spring or mattress, some of the suitcases and the clothing and other things, but an allowance far less than that which is claimed, will have to be made.

And then we come to the item that really is the major item here, and that is general damages for pain and suffering, for the permanent partial disability, for the disfigurement, and the mental anguish that has been sustained to date and that doubtless will for some time in the future. And here, again, is a difficult item to fix with any degree of certainty. I am sure that if these plaintiffs had been relegated to filing a claim with the Congressional Claims Committee, that item would not have begun to receive the consideration that it was entitled to because the members of the Claims Committee could not possibly have the picture that the Court gets after hearing and seeing. Usually these claims bills probably would receive from thirty minutes to forty-five minutes' consideration in each house. To allow much greater time, would make it impossible for Congress to get their business transacted.

The suggestion that there are minor children and that their welfare should be taken into consideration in an award here, must be discarded. If

this were a death loss it would have a place; but not being such, I feel I cannot give it consideration.

In approaching the whole matter and in fixing amounts, the Court has given serious consideration to the cases that have been submitted by counsel for the Government as to sums approved by the Court of last resort in this state. They are all cases wherein the Court refused to disturb the verdict as being an excessive one. This case of Long vs. Thompson, an accident somewhat similar to the accident we have here, the man was 52 years of age and was a blacksmith and the injury resulted in a total incapacitation so far as following his trade was concerned. The jury allowed ten thousand dollars. The Court said that didn't appear to be excessive. It is found in 177 Wash. on 296, and decided in 1934. The next case cited is Hirst vs. Standard Oil Company, 145 Wash. 597, where the recovery was eleven thousand a hundred eighty dollars and forty cents. It grew out of an automobile collision, and the left arm, as in this case, was so badly injured that it had to be amputated entirely. And in that connection, I may say that the plaintiff in that case perhaps did not suffer the pain that the plaintiff in this case, by reason of efforts here made to save the hand and arm, and the long hospitalization. This case discloses a hospitalization of better than six months, and a type of treatment employed that a mere description of it causes a person to feel pain, where the penetration of the bones on the fingers remaining and the hand, and the application of the wires to hold the parts in place was necessary. This Hirst case was decided in 1927.

The next case cited is Ekeberg vs. Tacoma, 142 Wash. 240. This case was likewise decided in 1927. Tacoma, a municipal corporation, was made the defendant and the verdict there was for thirteen thousand dollars, and the injury was substantial.

In addition, I have had my clerk check up to find additional cases that might be somewhat similar. I find the case of Johnson vs. Burnham, 198 Wash. 500, which was decided in 1939, where the jury awarded twenty-one thousand one hundred dollars for injuries and hospitalization, to a carpenter who was 50 years of age, and his earnings were between two and three hundred dollars a month. He suffered a compound fracture of the left leg, and there was a showing made that this might flare up and cause an amputation and that the loss was from twenty-five to fifty per cent. That verdict was sustained.

But, back as early as 1920 the Supreme Court of this state said in determining, that's in the case of McCreedy vs. Fournier, 133 Wash. 351, "In determining whether an award for damages for personal injuries, largely of a permanent character, is excessive the Courts must to some extent take into consideration the present-day conditions and factors which differ from those prevailing a few years earlier."

I call attention to this last case because I think that is a very sound expression of law in an action of this nature. We must take into consideration, now, the value of a dollar, and we should determine

judicially, because it is known to everyone, whether judge, lawyer, or otherwise, that a dollar is very cheap as compared to a dollar ten years ago. It is not for the Court to determine that this situation is always going to prevail, but it does prevail now and doubtless will for some time to come, and an award of five thousand dollars made ten years ago is little more—I'm being very conservative in my estimate—than an award of seventy-five hundred or eight thousands dollars would be now.

I take into consideration those factors in making the award here, and while I—I am trying to state, as I did at the outset, no determination of the amounts to be awarded as compensation can ever be set by anyone to be exactly right or exactly just.

I am going to allow in this case for loss of earnings over the period of time that the evidence indicates that this plaintiff has been and will be unable to work, the sum of five thousand dollars; for his medical care and attention, seven hundred and fifty dollars; for loss and damage to the automobile and his personal property, seven hundred and fifty dollars; and general damages for permanent disability, pain and suffering and future loss of earnings, the sum of seven thousand five hundred dollars; making a total of fourteen thousand dollars. Now, in addition thereto, I shall allow as the law provides, an attorneys' fee in the sum of fifteen per cent, which would be two thousand one hundred dollars, making a total award and judgment of sixteen thousand one hundred dollars.

Mr. Sager: If your Honor please, the law does not authorize the allowance of attorneys' fees in addition to the judgment.

The Court: That's the way I read the statute, but we'll read it again. I read it first probably a little hurriedly.

Section 422 of the act, "A Court rendering a judgment for plaintiff pursuant to part three of this title, or the head of a Federal agency or his designee, making an award pursuant to part two of this title, or the Attorney General making a disposition pursuant to Section 413 of this title, as the case may be, may, as a part of the judgment, award or settle judgment, award or settlement, determine and allow reasonable attorneys' fees, which if the recovery is five hundred dollars or more, shall not exceed ten per cent of the amount recovered under part two, or twenty per cent of the amount recovered under part three, to be paid out of but not in addition to the amount of the judgment or award and settlement."

That language makes your position sound, Mr. Sager, but I will accomplish the same purpose by making an allowance of sixteen thousand dollars and provide for a fifteen per cent attorneys' fee, as I intend to allow the plaintiff approximately fourteen thousand dollars net as his loss.

I feel that there should be a net award of this fourteen thousand. What the Court has in mind is the hope that after the expenditure of a reasonable amount of this money that this individual might follow such a course as to be able to make a living,

since in all probability he will never be able to be reassigned to the position that he has had with the— in the Navy Department.

Mr. Sager: And the costs——

The Court: Well, yes, the usual costs, but no interest on any amount here. The act provides that interest may not be allowed, that is, up to the date of recovery.

Mr. Hutton: It is a matter of law.

The Court: That's my view of it. Of course, Congress has to make an appropriation, or has to have an appropriation to pay—you can't levy upon any government property for collection of this money.

Mr. Hutton: We understand it will take some years before we get it, your Honor——

The Court: Yes, I don't know just when you will——

Mr. Hutton: There might be certain questions of minor importance in regard to the cost bill, but I suppose those will come up when we submit the costs. The service, of course——

The Court: Your attorneys' fees award would be slightly more in this manner than they would be as calculated on the fourteen thousand dollars.

Mr. Hutton: I was—I appreciate that, and I appreciate the decision of the Court, naturally, in the way it has been analyzed by the Court, but these other items that have been somewhat costly, that is of course, of having service made on parties, that would go in the regular cost but we will discuss those at the time.

The Court: Well, no, they wouldn't—you couldn't include—I don't know just what you mean by other items. The travel back and forth?

Mr. Hutton: Oh, no. No, no. I mean money we actually paid out in this Court and to the Marshal, and so forth.

The Court: Oh, those are proper items.

Mr. Hutton: That's all that I——

The Court: But the major item of allowance here for general damage, pain, suffering through future loss, covers——

Mr. Hutton: Oh, yes. No, there was no thought in my mind in regard to that. The items consist—well, I will be specific about it, your Honor. There might be some question with regard to this man Morse, but we thought that he should be a party, and he was served at a cost of about \$29.50, and it is just the regular things that go in a cost bill, and that might be settled later, your Honor.

The Court: No, I will be prepared to settle it now.

Mr. Hutton: Well, I——

The Court: But you—I think the better way for you to do is to prepare and serve and file a cost bill.

Mr. Hutton: If your Honor please, there is something outside that I have to run across before, maybe your Honor is familiar with. We will, of course, submit to our client a cost statement, and I don't want to do what your Honor thinks isn't right by the client. Among other things, it cost for the doctor's testimony, one hundred dollars. Would that—things of that nature, would that be a proper

item of expense in figuring before we give our client his share? I imagine it would be, but I want to be fair with the Court in getting this person what monies you think are coming to him.

The Court: Well, I don't like to rule definitely. Off hand, it seems to me it would. This statute is penal in its nature, relative to overcharges for attorneys' fees.

Mr. Hutton: I understand that, your Honor.

The Court: And counsel will have that in mind, but there is no thought in allowing a fifteen per cent attorneys' fee to have that cover the costs, which are chargeable under the statute.

Mr. Hutton: We will go over the statute, your Honor.

The Court: Now you had better prepare findings and conclusions of law and judgment, and submit those, and of course the item of costs will be dependent upon the determination there if there is a dispute between the parties. And I suggest your findings would be properly presented some Monday morning which is a law day.

Mr. Hutton: This coming Monday morning?

The Court: Well, if you desire, you may, but I——

Mr. Hutton: I doubt the possibility of our preparing——

The Court: No, there is no reason. Why, any Monday morning.

Mr. Hutton: I see. That is our regular law day in Kitsap County for all the lawyers over there, but one of us will come down and take care of it.

[Endorsed]: Filed Feb. 12, 1948.

In the District Court of the United States for the
Western District of Washington, Southern
Division

No. 1006

HOBART E. KEITH, et ux.,

Plaintiffs,

vs.

GOVERNMENT OF THE UNITED STATES OF
AMERICA, Doing Business Through PUBLIC
ROADS ADMINISTRATION, FEDERAL
WORKS AGENCY, and FRANK MORSE,
et ux,

Defendants.

TRANSCRIPT OF PROCEEDINGS ON
OCTOBER 6, 1947

The Court: Docket 1006, Hobart E. Keith and wife versus government of the United States.

Mr. Garland: Your Honor please, rather than taking judgment together with costs, I submitted my cost bill over five days ago, and would like to have that matter decided and the costs in the total judgment. The reason for this is the collection will be made from the United States, and sometimes their officials don't understand the adding the costs when the Judge gives judgment for so much.

If you will notice on page 1, about lines 20——

The Court: Yes, I see.

Mr. Garland: Yes, Well, on the cost bill, the United States Attorney and I are agreed except for

the second, third and fourth items. Those have to do with the serving of a Frank Morse who was dismissed from the case. If your Honor remembers, he was dismissed because of your Honor's opinion that he was not a necessary party. Since your Honor's decision there have been a lot of cases, and there was a complete review of them in the last issue of "The American Bar Journal." It held that about half the courts held the party in a similar situation was, and about half the courts held they weren't. There is no court that would be binding upon your Honor has yet passed on the subject, that I know.

Now in this particular case on the Court's ruling they were not necessary costs, but we were in the position of not knowing whether they would be or not when we started this lawsuit. They amount to \$36.51. Therefore, the judgment that your Honor enters will be either \$16,162.80 or \$16,199.37, depending on whether you allow those as taxable costs, or not, and I have no—it is entirely in your Honor's discretion there, and whether he was a necessary party to bring this action or not. You ruled once, so——

The Court: The statute, however, expressly provides that no judgment can be taken against the individual, and that an action of this kind bars a subsequent action against the individual. Isn't that correct?

Mr. Garland: That is correct. Your Honor will either let me fill in the judgment, or fill it in yourself for sixteen thousand one hundred and——

The Court: What about the other items, Mr. Sager, do you have any objection?

Mr. Sager: The cost bill?

The Court: Yes.

Mr. Sager: No, I haven't any objection except as to this item. I do want to make some objection to the findings.

The Court: Very well.

Mr. Sager: I think in general the judgment and the findings are in accord with your Honor's oral ruling. I think on page 3 of the findings, sub-paragraph 3 is not in accordance with the testimony. I don't know that your Honor made any special finding in regard to that factor. The finding is in failing to apply his brakes when he saw or should have seen that he was about to strike the car and trailer of the plaintiffs herein.

Now as I recall the testimony, the plaintiff's testimony, through the witness Billings, I believe, one eye witness to the accident other than the plaintiff and members of his family, that he said obviously from the skidmarks on the pavement, the government car had applied its brakes very vigorously in an attempt to stop, so it seems to me that finding is not in accord with the evidence.

Now, except for that finding, I think the rest of the findings are in accordance with your Honor's ruling.

I wish to take exception, however, to the finding number 5, in the computation of the amount of the total judgment. It allows a figure of \$9,600.00 for general damages and suffering, and disfigurement

and so forth. Now in that item there has been included the award of attorneys' fees, because when your Honor first announced its computation in the judgment that you allowed \$7500.00 for those elements of damage, and of course for the same reasons I think the judgment is in error in allowing a total of sixteen thousand one hundred, which in effect includes an addition of attorneys' fees, over and above the amount the Court first found as having been the amount of damages. I think the statute is clear that attorneys' fees while fixed by the Court, are not to be in addition to the judgment. They are to come out of the judgment, and I think that it is error to incorporate them in as part of the total judgment, and the obvious effect is to allow them as attorneys' fees. I think the judgment should be reduced by that amount. The original amount the Court found as having been—in measuring the damage of the defendant,—or of the plaintiff.

The Court: Mr. Sager, it became entirely a matter of calculation, and the Court stated expressly at the time I had misread the statute with reference to the attorneys' fees. I was under the impression that the attorneys' fees were in addition to the award to be made to the injured party. Upon that being called to the attention of the Court, and a re-reading of the statute, I was satisfied that such was the situation, but still of the opinion that the injured party was entitled to an award of approximately fourteen thousand dollars, net, and not fourteen thousand dollars from which there should be deducted attorneys' fees.

I was further of the opinion that an attorneys' fee in the sum of fifteen per cent was a reasonable attorneys' fee under all of the facts and circumstances in the case.

Now there was no intention that the attorneys' fee should be added as such to the last item, but it all comes out the same if it were broken down, and the sum were added to these various items. In other words the statute is not to be so rigidly construed as to make it impossible for the Court to take into consideration what the award and attorneys' fee is going to be when making the award for the loss sustained, and that would be the effect of the position you take, because the Court might have made an error in calculation or in interpretation, it would become a situation, if your position were sound, where the Court could never correct such an error and was forever bound by it.

Now technically it may be that this award should be scattered through the various items, but the result would be the same.

Mr. Sager: Well, of course my—the reason I raise the point at this time is that I think the effect of this judgment is to do what the statute says cannot be done, to allow an attorneys' fee over and above the actual amount of damage that the Court found the man had suffered.

The Court: The statute certainly doesn't say that the Court cannot exercise its discretion and allow an award, and out of that award there be attorneys' fees, and in calculating it that the court could not take into consideration what he proposed to leave as the net amount for the injured party.

Mr. Sager: Of course, the Court in the first instance, under the statute, is to find the amount of damage the person suffered; the amount of loss that he sustained. Now that is not—that is not affected one way or the other by attorneys' fees. He either suffers \$14,000 damages or he suffers \$16,000 damages. That is the actual loss that he has sustained.

The Court: I think, Mr. Sager, I stated—and of course it is a matter of common knowledge, that when we come to measure in dollars and cents human sufferings and injuries, there can be no standard by which we measure it with exactitude, and there is plenty in this record to warrant a finding of \$16,000 in damages in the aggregate, and that is the position the Court has taken.

Mr. Sager: Well——

The Court: The fact that I, under a misapprehension, used the figure \$14,000, and of the opinion that added to that would be attorneys' fees, but always with knowledge that the attorneys' fees were a part of the item of allowance, and then corrected it and made it \$16,000, it is, it seems to me, rather extreme technical grounds that the objection is made.

Mr. Sager: The Court's misapprehension was not as to the amount of damage suffered by the defendant—or by the plaintiff. The Court's misapprehension was to the effect of the statute in allowance of fees.

The Court: No, I expressed then and I will express now, so that you will have it clear in the record, that the defendant suffered damages in loss

of property and personal injuries, and pain and suffering, and permanent disability, in the sum of \$16,000.00.

Mr. Sager: Well, of course that was not the Court's first finding. The Court's first finding was that——

The Court: Well, it would be an unhappy situation if the Court were always bound by statements made if they were—if later he felt he was in error about it. In fact there is nothing in this case now that would bar the Court even upon its own initiative, if he felt in good conscience that he had made a mistake, and allow \$20,000.00, or allow \$5,000.00. You are tying yourself to the statement that I made that the damages were \$14,000. That was an oral statement subject to modifications and correction, and——

Mr. Sager: I want to call the matter to your Honor's attention at this time. I think probably I will and should file a motion, direct a formal motion to correct the judgment, and I think under the rules that has to be done within ten days after entry of judgment, but I wanted to call it to your Honor's attention at this time to give the Court an opportunity to correct the judgment if it felt it should.

The Court: Well, the only correction that I would make in the judgment, might even then be quite technical, that this—in the findings, the way the sum is broken down. It might be that that might be modified, because all of these were very flexible items. The personal effects and damages sought

there was something like three or four thousand dollars. The Court allowed \$750.00. The loss of earnings were substantially in excess of the amount the Court allowed.

I am *going have* you sign this as being presented by yourself——

Mr. Sager: If the Court signs the findings and the judgment at this time I would like exceptions included.

The Court: Very well. Do you desire to have the Court to note exceptions here on these——

Mr. Sager: Yes.

The Court: Now what is this item of costs?

Mr. Garland: \$62.80.

The Court: Is that what the total costs are?

Mr. Garland: Yes, your Honor.

The Court: I thought it was \$199.00.

Mr. Garland: No, just \$99.00. It makes sixty-two eighty if the items are struck, which counsel made the motion for, and which I think he properly made the motion. It makes a total judgment of \$16,162.80.

The Court: \$62.00?

Mr. Garland: And 80c.

The Court: I have noted your exceptions on the judgment in this language, Mr. Sager:

“The defendant excepts to the foregoing judgment and exceptions allowed.”

Mr. Sager: That is sufficient, your Honor. I think the exceptions should be noted in the findings and conclusions, as well.

The Court: I have made a notation on the findings and conclusions, the single notation:

“The defendant excepts to the foregoing findings and conclusions of law, and exceptions allowed.”

Mr. Sager: That is satisfactory.

CERTIFICATE

I, Russell N. Anderson, official court reporter for the above-entitled court, do hereby certify that the foregoing is a true and correct transcript of the matters therein set out.

/s/ RUSSELL N. ANDERSON,
Official Court Reporter.

[Endorsed]: Filed Feb. 12, 1948.

[Endorsed]: No. 11859. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Hobart E. Keith and Louise E. Keith, His Wife, Appellees. Transcript of Record. Upon Appeal From the District Court of the United States for the Western District of Washington, Southern Division.

Filed February 16, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11859

UNITED STATES OF AMERICA,

Appellant,

vs.

HOBART E. KEITH and LOUISE E. KEITH,
His Wife,

Appellees.

ORDER EXTENDING TIME TO FILE
TRANSCRIPT AND DOCKET CAUSE

Good cause therefor appearing, It Is Ordered that the time within which the United States of America, appellant herein, may file the certified transcript of record and docket above cause in this court be, and hereby is extended to and including February 16, 1948.

/s/ FRANCIS A. GARRECHT,
Senior United States Circuit
Judge.

Dated: San Francisco, Calif., February 16, 1948.

[Endorsed]: Filed Feb. 16, 1948.

[Title of Circuit Court of Appeals and Cause.]

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF RECORD FOR
PRINTING

Comes now appellant and pursuant to subdivision 6, Rule 19 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit, herewith adopts the statement of points filed by it in the District Court upon which appellant intends to rely on appeal, and herewith designates the entire transcript of record as prepared and certified by the clerk of the District Court, to be printed for purposes of this appeal.

Dated this 19th day of February, 1948.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ GUY A. B. DOVELL,
Assistant United States Attorney, Attorneys for
Appellant.

Service of the foregoing, by receipt of true copy thereof, is hereby acknowledged this 21st day of February, 1948.

/s/ A. J. HUTTON,
/s/ MARION GARLAND, JR.,
Attorneys for Plaintiffs-
Appellees.

[Endorsed]: Filed Feb. 27, 1948.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant
vs.

HOBART E. KEITH and LOUISE E. KEITH
his wife,
Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

HONORABLE CHARLES H. LEAVY, *Judge*

BRIEF OF APPELLANT

J. CHARLES DENNIS,
United States Attorney

GUY A. B. DOVELL,
Assistant United States Attorney
Attorneys for Appellant.

OFFICE AND POST OFFICE ADDRESS:
324 FEDERAL BUILDING
TACOMA 2, WASHINGTON

No. 11859

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant

vs.

HOBART E. KEITH and LOUISE E. KEITH
his wife,
Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

HONORABLE CHARLES H. LEAVY, *Judge*

BRIEF OF APPELLANT

J. CHARLES DENNIS,
United States Attorney

GUY A. B. DOVELL,
Assistant United States Attorney
Attorneys for Appellant.

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TACOMA 2, WASHINGTON



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IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant

vs.

HOBART E. KEITH and LOUISE E. KEITH
his wife,

Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

HONORABLE CHARLES H. LEAVY, *Judge*

BRIEF OF APPELLANT

JURISDICTION

This cause was commenced by the plaintiffs, Hobart E. Keith and Louise E. Keith, his wife, by filing a complaint in the District Court of the United States, Western District of Washington, Southern Division, on February 21, 1947 (Tr. 10). The complaint sought

recovery, under the Federal Tort Claims Act, of damages suffered by plaintiff Hobart E. Keith in a collision on July 9, 1946, between plaintiff's automobile and a government owned vehicle, the total of said damages alleged to be in the sum of \$41,260.10. (Tr. 2-10).

After a trial before the court, a judgment was entered in favor of the plaintiffs and against the defendant United States of America in the sum of \$16,100.00 and costs (Tr. 24-25). This judgment was entered October 6, 1947. A notice of appeal was filed by the defendant United States of America on January 2, 1948. (Tr. 26) This court has jurisdiction pursuant to 28 U.S.C. 225 and Rule 73 of the Rules of Civil Procedure.

QUESTION PRESENTED

Upon trial of claim arising under the Federal Tort Claims Act, where the court has rendered its decision finding the several items of damages suffered by plaintiff in the total sum of \$14,000 and allowing in addition 15% thereof for attorney fees in the sum of \$2100.00, with a total recovery of \$16,100, and thereafter and on presentation sign, over objection by defendant, formal findings distributing the amount allowed for attorney fees to an item of the damages, may the court properly thereupon enter judgment for the sum of \$16,100 in order that the statutory require-

ment that such fees be deducted and not added may be complied with and at the same time so that such allowance has not the effect of reducing the amount of damages the court has found the plaintiff suffered and should be allowed.

STATEMENT OF CASE

The District Court, at the conclusion of trial, on September 19, 1947, in rendering its decision and award of damages, announced its judgment as follows:

“I am going to allow in this case for loss of earnings over the period of time that the evidence indicates that this plaintiff has been and will be unable to work, the sum of five thousand dollars; for his medical care and attention, seven hundred and fifty dollars; for loss and damage to the automobile and his personal property, seven hundred and fifty dollars; and general damages for permanent disability, pain, and suffering and future loss of earnings, the sum of seven thousand five hundred dollars; making a total of fourteen thousand dollars. Now, in addition thereto, I shall allow as the law provides, an attorney’s fee in the sum of fifteen per cent, which would be two thousand one hundred dollars, making a total award and judgment of sixteen thousand one hundred dollars.” (Tr. 43)

Thereupon the following objection was made by counsel for the defendant:

“Mr. Sager: If your Honor please, the law does not authorize the allowance of attorney’s fees in addition to the judgment.”

“The Court: That’s the way I read the statute, but we’ll read it again. I read it first probably a little hurriedly.”

The court then read Section 422 of the Act and further stated:

“That language makes your position sound Mr. Sager, but I will accomplish the same purpose by making an allowance of sixteen thousand dollars and provide for a fifteen per cent attorney’s fee, as I intend to allow the plaintiff approximately fourteen thousand dollars net as his loss. I feel that there should be a net award of this fourteen thousand.” (Tr. 44)

And it also later appeared:

“The Court: Your attorney’s fees award would be slightly more in this manner than they would be as calculated on the fourteen thousand dollars.” (Tr. 45)

Thereafter on October 6, 1947, at the time of presentation of formal Findings of Fact, Conclusions of Law and Judgment, as prepared by counsel for plaintiff, counsel for defendant took exception thereto as follows: (Tr. 50-53)

“Mr. Sager * * * *

I wish to take exception, however, to the finding number 5, in the computation of the amount of the total judgment. It allows a figure of \$9,600.00 for general damages and suffering, and disfigurement and so forth. Now in that item there has been included the award of attorneys’ fees, because when your Honor first announced its computation in the judgment that you allowed

\$7500.00 for these elements of damage, and of course for the same reasons I think the judgment is in error in allowing a total of sixteen thousand one hundred, which in effect includes an addition of attorneys' fees, over and above the amount the court first found as having been the amount of damages. I think the statute is clear that attorneys' fees while fixed by the court, are not to be in addition to the judgment. They are to come out of the judgment, and I think that it is error to incorporate them in as part of the total judgment, and the obvious effect is to allow them as attorneys' fees. I think the judgment should be reduced by that amount. The original amount the court found as having been in measuring the damage of the defendant, — or of the plaintiff.

The Court: "Mr. Sager, it became entirely a matter of calculation, and the court stated expressly at the time I had misread the statute with reference to the attorneys' fees. I was under the impression that the attorneys' fees were in addition to the award to be made to the injured party. Upon that being called to the attention of the court, and a rereading of the statute, I was satisfied that such was the situation, but still of the opinion that the injured party was entitled to an award of approximately fourteen thousand dollars, net, and not fourteen thousand dollars from which there should be deducted attorneys' fees.

* * * *

Now there was no intention that the attorneys' fees should be added as such to the last item, but it all comes out the same if it were broken down, and the sum were added to these various items. In other words, the statute is not to be so rigidly construed as to make it impossible for the court to take into consideration what the award and attorneys' fee is going to be when making the

award for the loss sustained, and that would be the effect of the position you take, because the court might have made an error in calculation or in interpretation, it would become a situation, if your position was sound, where the court could never correct such an error and was forever bound by it.

Now technically it may be that this award should be scattered through the various items, but the result would be the same.

Mr. Sager: Well, of course my — the reason I raise the point at this time is that I think the effect of this judgment is to do what the statute says cannot be done, to allow an attorneys' fee over and above the actual amount of damage that the court found the man had suffered.

The Court: The statute certainly doesn't say that the court cannot exercise its discretion and allow an award, and out of that award there be attorney's fees, and in calculating it that the court could not take into consideration what he proposed to leave as the net amount for the injured party.

Mr. Sager: Of course, the court in the first instance, under the statute, is to find the amount of damage the person suffered, the amount of loss that he sustained. Now that is not — that is not affected one way or the other by attorney's fees. He either suffers \$14,000 damages, or he suffers \$16,000 damages. That is the actual loss that he has sustained.

The Court: I think, Mr. Sager, I stated — and of course it is a matter of common knowledge, that when we come to measure in dollars and cents human sufferings and injuries, there can be no standard by which we measure it with exactitude, and there is plenty in this record to

warrant a finding of \$16,000 in damages in the aggregate, and that is the position the court has taken.

Mr. Sager: Well —

The Court: The fact that I under a misapprehension, used the figure \$14,000, and of the opinion that added to that would be attorneys' fees, but always with knowledge that the attorneys' fees were a part of the item of allowance, and then corrected it and made it \$16,000, it is it seems to me rather extreme technical grounds that the objection is made.

Mr. Sager: The court's misapprehension was not as to the amount of damages suffered by the defendant — or by the plaintiff. The court's misapprehension was to the effect of the statute in allowance of fees."

The trial court, although signing the formal findings, conclusions of law, and judgment, as presented by counsel for plaintiff, nevertheless was constrained to observe:

"The court: Well, the only correction that I would make in the judgment might even then be quite technical, that is — in the findings, the way the sum is broken down. It might be that might be modified, because all of these were very flexible items * * * *." (Tr. 54)

Thereupon, the court entered judgment for said sum, with exceptions to defendant. (Tr. 24 - 25)

The trial court had prior thereto by entry of its Pre-trial Order (Tr. 15-18) confined the issues of fact before the court to a single issue, namely,

“The amount of damage the plaintiff, Hobart E. Keith received.” (Tr. 16)

STATEMENT OF POINTS TO BE URGED

1. That the District Court, in rendering judgment for plaintiffs, erred in allowing attorneys' fees in addition to an award of damages and in entering judgment in the aggregate amount including the allowance for attorneys' fees. (Tr. 43-45, 50-54).

2. That the judgment of the District Court is excessive in the sum of \$2100.00, the amount of the attorneys' fees allowed in addition to the amount of damages awarded to the plaintiffs. (Tr. 24-25, 43).

ARGUMENT

The several specifications of error, Points I and II, embody practically the same subject matter and the appellant's argument as to one will apply with equal force as to the other. Therefore, they will be discussed together.

That part of Section 422 of the Federal Tort Claims Act of August 2, 1946 (28 U.S.C. 944), pertinent in the present instance, reads as follows:

“The court rendering a judgment for the plaintiff pursuant to subchapter II of this chapter, * * * may, as a part of the judgment, * * * determine and allow reasonable attorneys' fees,

which, if the recovery is \$500 or more shall not exceed * * * 20 per centum of the amount recovered under subchapter II of this chapter, to be paid out of but not in addition to the amount of judgment * * * recovered, to the attorneys representing the claimant. Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be guilty of a misdemeanor, and shall, upon conviction thereof, be subject to a fine of not more than \$2,000 or imprisonment for not more than one year, or both."

The question seems to resolve itself into whether or not the court can do indirectly what it is forbidden to do directly. That is, whether or not the intent of the statute expressed in emphatic terms and with penalty for violation attached can be circumvented by the simple expedient of raising the damages in order to allow damages to a plaintiff in the full amount suffered, keeping in mind that a percentage must be deducted for attorney fees.

When after awarding plaintiff damages totalling fourteen thousand dollars, and in addition an attorney's fee of \$2100.00, the attention of the court was directed to the statute, nevertheless the court was of the opinion:

"I feel that there should be a *net* award of this fourteen thousand." (Tr. 44) (Italics supplied).

And at the time of entering the judgment, the

court restated its previously expressed position, as:

“ * * * Still of the opinion that the injured party was entitled to an award of approximately fourteen thousand dollars net, and not fourteen thousand dollars from which there should be deducted attorneys’ fees.” (Tr. 51)

And the court thereafter reiterated its construction of the statute:

“In other words the statute is not to be so rigidly construed as to make it impossible for the court to take into consideration what the award and attorneys’ fee is going to be when making the award for the loss sustained * * *”. (Tr. 52)

* * * *

“The statute certainly doesn’t say that the court cannot exercise its discretion and allow an award, and out of that award there be attorneys’ fees, and in calculating it that the court could not take into consideration what he proposed to leave as the net amount for the injured party.” (Tr. 52)

Such consideration seems tantamount to making the attorneys’ fees an element of damages, and the general rule is:

“Generally, there can be no recovery as damages of the expenses of litigation and attorneys’ fees unless authorized by statute or contract.”
25 C.J.S. Damages, Section 50.

In *Viner v. Untrecht*, 158 P. (2d) 3, at page 9, the Supreme Court of California recognized the foregoing rule:

“Generally, fees paid to attorneys are not recoverable from the opposing party either as costs, damages, or otherwise in the absence of express statutory or contractual authority. * * *”

“We find no room for interpretation in the matter. Moreover, it is improper to include attorneys’ fees as a part of exemplary damages.”

This rule has been observed in federal cases:

“It is well settled that a plaintiff cannot recover attorneys’ fees incurred in connection with a suit to recover damages for a tort.”

Insuranshares Corporation v. Northern Fiscal Corporation, 42 F. Supp. 126, 129.

In *Union Indemnity Co. v. Vetter*, 40 F. (2d) 606, where in an action on bond to recover for breach of building contract, the District Court permitted evidence of attorneys’ fees to be introduced and the jury awarded damages on that account, the appellate court held the elements of damage consisting of attorneys’ fees should be eliminated and that the appellee was entitled to what he actually and reasonably expended in finishing the building after the contractor had abandoned it, and thereupon reversed the cause and remanded the same for further proceedings in conformity with its ruling.

United States Fidelity & Guaranty Co. v. Highway Engineering & Construction Co., 51 F. (2d) 894, cites, and supports the *Vetter* case, *supra*.

See also *Frick Co. v. Rubel Corporation*, 62 F. (2d) 769; *Storley v. Armour & Co.*, 107 F. (2d) 499.

A similar statute, Section 8, Title 49, U.S.C., makes provision for damages and attorneys' fees as follows:

"In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorneys' fee shall be taxed and collected as part of the costs in the case."

However, the court in *Sonken-Galamba Corporation v. Atchison, T. & S. F. Ry. Co.*, 28 F. Supp. 456, against the plaintiff's contention that it should recover the amount of attorneys' fees expended in a preliminary action in which defendant railway company was a party, in rejecting the same and refusing to broaden the elements of damage even where the wording of the statute indicated full relief, had this to say:

"The express provision for the recovery of an attorney's fee in the suit for damages was necessary if such an attorney's fee is to be recovered, for the general rule is that an attorney's fee is not recoverable. The mere fact that Congress

deemed it necessary to make special provision for the recovery of an attorney's fee in the suit for damages authorized by Congress strongly suggests that it was not intended by Congress that other attorneys' fees expended in merely incidental litigation should be recovered as damages. The statute provides that the injured party may recover 'the full amount of damages sustained'. But the phrase 'full amount' adds nothing to the significance of the statute, only 'damages known to the law' are recoverable. *Pennsylvania R. Co. v. International Coal Mining Co.*, 230 U. S. 184, 204, 33 S. Ct. 893, 57 L. Ed. 1446 Ann. Cas. 1915A, 315."

It is, therefore, the contention of appellant that the trial court's action herein in the allowance of attorney's fees is in effect an attempt to make the same an element of damages, and is due to mistake or error of law, and that such allowance should be corrected to conform to statute.

See 5 C. J. S. Appeal and Error, Section 1636; *Mercantile-Commerce Bank & Trust Co. v. S. E. Arkansas Levee District*, 106 F. (2d) 966.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court is excessive in the sum of \$2100.00, and should be reduced accordingly.

Respectfully submitted,

J. CHARLES DENNIS,
United States Attorney

GUY A. B. DOVELL,
Assistant United States Attorney.

No. 11859

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

HOBART E. KEITH and LOUISE E. KEITH,
his wife,

Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

HONORABLE CHARLES H. LEAVY, *Judge*

BRIEF OF APPELLEES

A. J. HUTTON,
MARION GARLAND, JR.,
Attorneys for Appellees.

Office and Post Office Address:
Dietz Building,
Bremerton, Washington.

FILED

JUN 1 - 1948

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No. 11859

IN THE
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UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

HONORABLE CHARLES H. LEAVY, *Judge*

BRIEF OF APPELLEES

RESTATEMENT OF QUESTIONS PRESENTED

1. When a court makes a Findings of Fact and Conclusion of Law and enters his judgment, all of which hold in writing that the plaintiffs' damage is in the sum of \$16,-100.00, and on appeal the Transcript of Record does not contain any matters relating to the amount of damage suff-

ered, does the Circuit Court have sufficient facts with which to say the trial court erred in rendering the amount of damages?

2. Is a trial court bound by an oral amendment or decision, or is he at liberty at any time to change his ruling until such time as he enters Findings of Fact, Conclusions of Law and Judgment?

ADDITIONAL STATEMENT OF THE CASE

After three days of trial, the trial of this case was concluded September 19th, 1947. Thereafter, as customary, the judge discussed many of the points of fact and law concerned in the case in order to assist the attorneys in drawing the Findings of Fact, Conclusions of Law and Judgment, so they would be consistent with the court's opinion. Thereafter, the court signed Findings of Fact, Conclusion of Law and Judgment on the 6th day of October, 1947, and that said Findings of Fact pertinent to this appeal are as follows:

"That as a direct result of said striking of the plaintiffs' car by the defendant's car as above set forth, the plaintiffs' car and personal effects were damaged in the total sum of seven hundred and fifty (\$750.00) dollars; that the plaintiff, Hobart E. Keith's left arm was mangled causing him damage in the further and following amounts: Loss of earnings on behalf of the defendant, Hobart E. Keith, both past and future, in the sum of five thousand (\$5000.00) dollars (said \$5000.00 exclusive of compensation due plaintiff for other United States services); the said Hobart E. Keith will need medical care, which he cannot receive from the United States Government under any of his present preferences,

in the sum of seven hundred fifty (\$750.00) dollars and that the defendants are further damaged in general damages for shock, pain, embarrassment, suffering, disfigurement, maiming and all other injury in the sum of nine thousand, six hundred (\$9,600.00) dollars or in a total amount of sixteen thousand, one hundred (\$16,100.00) dollars.” (Tr. 22.)

On the same date appropriate Conclusions of Law were drawn, as follows:

“That the defendant, United States of America, has damaged the plaintiffs in the sum of sixteen thousand, one hundred (\$16,100.00) dollars for which the plaintiffs are entitled to judgment, together with Court costs, as provided by law.” (Tr. 23.)

Judgment was entered consistent with said Findings of Fact and Conclusions of Law, the appropriate part of which is as follows:

“Ordered, Adjudged and Decreed that the plaintiffs have judgment against the defendant, United States of America, in the sum of Sixteen Thousand, One Hundred (\$16,100.00) Dollars, together with costs, as provided by law, in the sum of \$62.80, making a total judgment in the sum of \$16,162.80.” (Tr. 24 and 25.)

ARGUMENT IN SUPPORT OF TRIAL COURT'S DECISION

The only question possible to appeal here is whether or not the trial court had a proper mental process in making his Findings of Fact, Conclusions of Law and Judgment. There can be no question raised but that his ultimate result

of the amount of damages was correct as the Findings of Fact and Conclusions of Law supported the judgment.

That the plaintiff in this case was actually damaged in the sum of \$16,100.00 is not questioned by the appellant, who must conclude that the damages in the sum of \$16,100.00 are reasonable. It is axiomatic that if the damages are reasonable, the court's so determining them as being reasonable is the proper thing for the court to do.

ARGUMENT IN ANSWER TO ARGUMENT OF APPELLANT

The answer to the statement of points of the appellant that

“the District Court, in rendering judgment for plaintiffs, erred in allowing attorneys’ fees in addition to an award of damages and in entering judgment in the aggregate amount including the allowance for attorneys’ fees”

is very simple. The answer is that the court did not do this. The court very definitely made a Findings of Fact (Tr. 22) that the appellee was damaged in the sum of \$16,100.00, and did not enter any aggregate judgment including attorneys’ fees, but the judgment itself specifically provides the attorneys’ fees shall come out of the award to the defendant.

“It is further

“Ordered, Adjudged and Decreed that the plaintiffs’ attorneys, A. J. Hutton and Marion Garland, Jr., receive from the plaintiffs the sum of fifteen per cent (15%) of their total judgment as attorney’s fees, or the

sum of Two Thousand, Four Hundred and Fifteen (\$2,415.00) Dollars; same to be paid from the moneys received on this judgment.” (Tr. 25.)

In other words, the appellant has raised questions which in truth and in fact do not exist.

In our opinion, the question that actually was in the appellant’s mind should be as follows:

If a judge of the Federal Court, under a misapprehension of the law of the case, makes an oral statement from the bench in rendering his opinion, and said misapprehension is called to his attention, can he then change his opinion to conform to the law, and incorporate in his final decision his true findings, all in accordance with the law?

Appellants answer this in the negative.

If the appellant’s argument is sound, the court would have to be most careful in what he said during or after a trial, before signing the judgment. If he spoke out of turn or by mistake, he would have no way out, and errors could never be corrected.

The Federal Judge who tried this case recognized the soundness of this argument. See Appellant’s Brief, last paragraph, page 5, extending onto page 6.

The case of *Viner v. Untrecht*, 158 P. (2d) 3, cited on page 10 of appellant’s brief, is where the court allowed attorneys’ fees in excess of the judgment to the defendant. That is not so in the case at bar. The case of *Insuranshares Corporation v. Northern Fiscal Corporation*, 42 F. Supp. 126, is likewise not in point.

In the case of the *Union Indemnity Co. v. Vetter*, 40 F. (2d) 606, cited on page 11 of the appellant's brief, is not in point, as the attorneys' fees there were not allowable as an element of damage and were held to be one of the elements of damage. In the case at bar it is found that the plaintiff's damage is so much and the attorneys' fees are not an element of that damage.

The question is not raised here, but that 15% for attorneys' fees is a reasonable sum to allow the attorneys.

The rest of the cases cited in the brief are for the same reasons not in point.

The only facts properly before this court at the present time is the form of Findings of Fact and Conclusions of Law presented by the court. The case of *Meyer v. Everett Pulp & Paper Co.*, 193 Fed. 857, at page 863, sets out the law very concisely that the decision of the judge as to amount will not be upset unless there is before the court some evidence to show the amount was excessive:

"The general conclusion that the plaintiffs should take nothing except the money deposited is tantamount to a general verdict of a jury, and we are not permitted to look into the evidence for determining whether the conclusion was properly deduced.

"We could not do so even if it were proper, because the record does not contain all the evidence adduced at the trial. Nor can the written opinion of the court be considered as a findings of facts. It shows the conclusion of the judge upon the facts and the law, but it cannot be treated as a finding of conclusions of either fact or law."

That a court is not bound by its reasoning if its judgment is upheld by the facts is axiomatic. The case of *Interstate Circuit, Inc., v. United States*, 304 U. S. 55, 82 Law Ed. 1146, states the law as follows:

“The opinion of the court was not a substitute for the required findings. A discussion of portions of the evidence and the court’s reasoning in its opinion do not constitute the special and formal findings by which it is the duty of the court appropriately and specifically to determine all the issues which the case presents. This is an essential aid to the appellate court in reviewing an equity case (*Railroad Commission v. Maxcy*, 281 U. S. 82, 74 L. Ed. 717, 50 S. Ct. 228) * * *.”

The rule is set out in 53 *Am. Jur.* 784, paragraph 1129, as follows:

“* * * The decision of the court is its judgment, while its opinion consists of and represents the reasons given for, or the grounds of, the decision and judgment. Such reasons are no essential part of the decision, *and in the eyes of the reviewing court they are not material if the decision itself is proper.* It is universally recognized that a correct decision will not be disturbed even though it is based on improper grounds. *Neither does the court’s opinion, giving the reasons for its decision, operate as findings of fact by the court.* * * * But in reviewing a judgment, an appellate court will examine the lower court’s opinion only for the purpose of ascertaining the arguments made and the reasons given in support of the lower court’s rulings and determinations.

“The court has been held free to change its decision, orally announced, on the merits before judgment has been entered thereon.” (*Italics ours.*)

In *Ritter v. Johnson*, 163 Wash. 153, 300 Pac. 518, the

court very ably and simply takes care of the same question as here raised. Quoting from 163 Wash. 155 and 156:

“Appellant first contends that the court erred in entering judgment in respondents’ favor, having once orally announced a decision in appellant’s favor to the effect that the action would be dismissed. No judgment having been entered, the court was at liberty to change its ruling, and no error can here be predicated upon the fact that such change was made. *Landry v. Seattle, P. A. & W. R. Co.*, 100 Wash. 453, 171 Pac. 231; *Quigley v. Barash*, 135 Wash. 338, 237 Pac. 732.”

It is therefore concluded by the appellees that the court did not allow attorneys’ fees in excess of the amount of damages awarded the appellees and that the question of whether or not the attorneys’ fees of 15% are reasonable is answered by the statute itself, which allows attorney fees up to 20%. And the question of whether or not the damages allowed were excessive is precluded by the fact that the appellant did not certify to this court in the transcript a statement of those facts upon which the damage was based.

CONCLUSION

It is respectfully submitted the trial court should be affirmed and the appellees should be given their costs upon this appeal as provided by law.

Respectfully submitted,

A. J. HUTTON,
MARION GARLAND, JR.,
Attorneys for Appellees.

No. 11860

United States
Circuit Court of Appeals
For the Ninth Circuit.

LEE FONG FOOK,

Appellant,

vs.

I. F. WIXON, District Director, Immigration
and Naturalization Service, Port of San
Francisco,

Appellee.

Transcript of Record

Upon Appeals from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

MAR - 4 1948

PAUL P. O'BRIEN,

CLERK

No. 11860

United States
Circuit Court of Appeals
For the Ninth Circuit.

LEE FONG FOOK,
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vs.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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EDGAR R. BONSALL,
Assistant United States Attorney,
Attorneys for Appellee.

In the United States District Court, in and for
the Northern District of California, Southern
Division

No. 27790-G

In the Matter of
LEE FONG FOOK,
On Habeas Corpus

PETITION FOR WRIT OF HABEAS CORPUS

To the Honorable, the United States District Judge
of the United States District Court, in and for
the Northern District of California:

It is respectfully shown by the petition of the undersigned that the above named, Lee Fong Fook, hereinafter in this petition referred to as the "detained," is unlawfully imprisoned, detained, confined and restrained of liberty by I. F. Wixon, District Director, Immigration and Naturalization Service, San Francisco, California, in the said Northern District of California, Southern Division thereof; that said imprisonment, detention, confinement and restraint are illegal and that the illegality thereof consists in this, to-wit:

This affiant is informed and believes and therefore alleges that said Lee Fong Fook is a citizen of the United States of America, having been born April 6, 1901, in San Francisco, [1*] California;

*Page numbering appearing at foot of page of original certified Transcript of Record.

that on August 14, 1944, such proceedings were taken and had by him, pursuant to the provisions of the applicable statutes of the State of California, to-wit: Sections 10,600 to 10,615 inclusive of the Health and Safety Code, that on said date the Superior Court of the State of California duly and regularly entered its decree in proceeding No. 331145 of the records of the said Superior Court, decreeing that the said detained was born on said date in the said City and County of San Francisco, State of California; that no appeal has been taken from said decree and said judgment of said Court, and that said decree is final. Section 10607 of said code was duly complied with. That pursuant to Section I, Article IV of the Constitution of the United States, the said detained is a citizen of the United States of America.

That said detained is an honorably discharged veteran of the United States Army, holding an honorable discharge dated February 10, 1943.

That since his birth, as affiant is advised, believes and therefore alleges, the said detained has continuously resided in the United States until on or about January 31, 1947, when he left the United States for a temporary visit to China, and that thereafter and on or about August 25, 1947, he returned to the United States and endeavored to enter the United States through the port of San Francisco, State of California; that thereafter and for a long period of time he was held in confinement and incommunicado and was not permitted to see his friends or his counsel; that he is still in con-

finement and is being held in confinement by the said I. F. Wixon, District Director, Immigration and Naturalization Service, San Francisco, California, who has knowledge of the facts hereinabove stated, or has had sufficient time to ascertain those facts.

That the said decree of the said Superior Court of the [2] State of California, in and for the City and County of San Francisco, is binding upon the said Immigration authorities and is so held to be binding upon them in a decision of the United States District Court for the Western District of Washington, in the matter of Dong Yee Yuen vs. R. P. Bonham, District Director, Immigration and Naturalization Service, Seattle, Washington; that a true and correct copy of the said decision, the oral opinion of the Court, is attached hereto and made a part hereof.

That the said detained is entitled forthwith to be released from the imprisonment, confinement and detention in which the said I. F. Wixon, District Director, Immigration and Naturalization Service, San Francisco, California, now illegally holds him.

For a further and second ground for the release of the said detained from the said imprisonment, confinement and detention in which he is now being held, petitioner avers:

Petitioner incorporates herein all of the allegations hereinabove set forth in this petition.

Petitioner states the fact to be that on several occasions during his confinement the said detained appeared before a Board of Special Inquiry who purported to try the case of the said detained and that the hearings before the said Board of Special Inquiry were ordered closed after purported testimony had been taken and had by said Board and that he will be further detained for a period of time unknown to him or to this petitioner, and will be detained for the term and the length of time to be determined by the said I. F. Wixon, District Director, Immigration and Naturalization Service, San Francisco, California; that issues of fact have been raised by the said Director and the said Board of Special Inquiry, and that the said detained was required to produce witnesses to meet said issues of fact while in confinement; that said detained found it a practical impossibility to do so; that while the said hearings were ordered closed under the practice of the said Immigration Service, the said detained is still entitled to produce witnesses upon his behalf, but cannot do so because he is kept in confinement.

That petitioner has been advised informally that the said Board of Special Inquiry will hold that said detained is not entitled to land in this country and is not a citizen of this country, but this petitioner has received no official information or official or other copies of any decision of the said Board. That the petitioner has just been advised and upon such advice and belief alleges, that a Mr. Chin, who was working with this petitioner assisting him in

the said case, was debarred from seeing the said detained and was advised that no person can see said detained.

That this affiant sent a telegram to the Honorable Joseph Savoretti, Assistant Commissioner, Immigration and Naturalization Service, at the main office of said Service in Philadelphia, Pennsylvania; that a copy of the said telegram is attached hereto and that a copy of the reply to said telegram is attached hereto and both made a part of this petition. That the fact, as stated in the reply indicated by said telegram, that it is impracticable to release any person in like position as detained, is not sufficient to impinge or trespass upon or destroy the Constitutional rights and privileges of the said detained, and that the rule set forth in the decision by the United States Circuit Court of Appeals, Ninth Circuit, in the case of *Yuen Boo Ming vs. United States*, 103 Federal Second 355, contains no such exception. That pursuant to Article V of the Amendments to the Constitution of the United States, this detained is entitled forthwith to be released upon bail and now asks this Honorable Court to fix bail in a reasonable amount and order the release of this detained forthwith to the end that this detained will not be deprived of his Constitutional rights to due process. In the event of further trial, [4] said detained being held in said imprisonment, his trial has been and would be unfair, arbitrary, destructive of the Constitutional rights of the said detained and therefore illegal and void, and it is to the best interest of both the said detained

and the said Immigration and Naturalization Service that said detained be forthwith released upon bond in the event that he is to be not forthwith released upon the first ground stated in this petition.

That heretofore and on or about November 19, 1947, in the matter of You Yut Gee, on Habeas Corpus, filed in the above Court, No. 27749R, the Honorable Michael T. Roche presiding, Judge, on application for a writ of Habeas Corpus, the detained in said action, being in the identical position as the detained herein, was duly released upon said petition upon bail in the sum of \$1000.00.

That after the release of the said You Yut Gee, he being of the identical position as the detained in this case, petitioner requested the release of the detained from the local officials of the Immigration and Naturalization Service. They advised that they had no authority in the matter and would communicate with the Central office at Philadelphia, Pennsylvania. That attached hereto is a true and correct copy of a letter received by this petitioner on December 1, 1947, which said copy of letter is made a part of this petition.

For a further ground for the release of the said detained from the said imprisonment, confinement and detention in which he is now being held, petitioner avers:

Petitioner incorporates herein all of the allegations set forth in the First and Second grounds of this petition.

Petitioner states the fact to be that the hearing of the petitioner before the Board of Special Inquiry thus far held is absolutely void, contrary to law, and of no force or effect, and [5] any order predicated thereon is void, contrary to law and of no force or effect, pursuant to the provision of Article V of the Constitution of the United States. That in the decision of the United States Circuit Court of Appeals, Ninth Circuit, in the case of Yuen Boo Ming vs. United States, 103 Federal Second 355, the following rule was firmly established: "The compulsion of the preparation of his or affirmative proof while in confinement is an affront to the ordinary citizen's concept of due process."

This petitioner avers that during the hearings before the Board of Special Inquiry he represented said detained, and because of the detention the detained could not prepare for his defense nor obtain any witnesses to important and material facts with reference to the issues of fact raised by the said Board of Special Inquiry, that he could have otherwise obtained had he been released upon bond; that his hearing was therefore arbitrary, unfair, violative of his Constitutional rights and void, and any action predicated upon said hearings before said Board is likewise void.

This petitioner further states the fact to be that petitioner was deprived by said Board of his rights, under Article V of the Amendments to the Constitution of the United States, in this, that he was deliberately deprived of the right by said Board to cross-examine witnesses.

That the records of the hearings of the said detained by the said Board shows that pending the hearings before said Board, a member of said Board went to the City Hall, San Francisco, California, interviewed witnesses, the names of which this petitioner does not know, and looked at maps, assertedly official, and went around certain parts of Chinatown looking for witnesses for the hearing and took the testimony of one James Lee, whether under oath or otherwise petitioner does not know, and then introduced into evidence the statements of said witness and a statement [6] of what was shown on said assertedly official maps; that thereafter the said member of the said Board again engaged in a search for witnesses and again took the testimony of the witness James Lee and again introduced into evidence the statements of the said James Lee, upon issues of which said evidence thus introduced and placed in the record by the said member of said Board was regarded by the Board and by such member as material to the issue of whether detained is or is not a citizen of the United States. That in thus depriving said detained of his right to cross-examine witnesses and in thus searching out for witnesses against this detained and in thus receiving as evidence the testimony of the said so-called witness and of said maps, this said detained was deprived of his right of cross-examination of all of said witnesses, was given an arbitrary and unfair trial and was completely deprived of his rights to due process, and that the trial was had contrary to the ordinary concepts of fair play and fairness.

That the hearings of said Board of Special Inquiry are void and that any order of deportation that may be predicated upon them is likewise void.

This petitioner hereby refers to and incorporates herein all of the records of files and proceedings in the matter of Lee Fong Fook before the Board of Special Inquiry and alleges his willingness to incorporate and have considered as a part and parcel of this petition when the same shall be presented to this Court.

That while the detained is entitled to appeal from the said order of the said Board of Special Inquiry to the Director of Immigration and Naturalization Service at Philadelphia, that such appeal would be an idle act since the matters hereinabove alleged appear upon the face of the record of the hearings of the said detained before said Board of Special Inquiry, all of which make the said record of the said hearing void upon its face and [7] of no force or effect.

Wherefore petitioner prays that a writ of Habeas Corpus issue herein as prayed for, directed to said I. F. Wixon, District Director, Immigration and Naturalization Service, San Francisco, California, commanding and directing him to bring the body of said detained before this Court at a time and place to be specified by this Court, together with the cause of his detention, so that the same may be inquired into, to the end that said detained may be restored to his liberty and go hence without delay, and that upon the issuance of an order to show cause herein,

the Court fix bail in a reasonable amount so that his detention may immediately cease.

Dated, San Francisco, California, December 8, 1947.

/s/ G. C. RINGOLE,

Attorney for Lee Fong Fook,
Detained.

State of California,

City and County of San Francisco—ss.

The undersigned being first duly sworn, deposes and says:

That he is the petitioner named in the foregoing petition; that he knows the contents thereof; that the same is true of his own knowledge except as to those matters which are therein stated on his information and belief, and as to those matters, he believes it to be true.

/s/ G. C. RINGOLE.

In the United States District Court for the Western
District of Washington, Northern Division

No. 1732

DONG YEE YUEN,

Petitioner,

vs.

R. P. BONHAM, District Director, Immigration
and Naturalization Service, Seattle, Wash-
ington,

Respondent

COURT'S ORAL OPINION

February 20, 1947

The Court: There are a number of other grounds here, but this, to the Court, is the major considera-

tion in this case, and unless there is some proof that this whole proceeding is a fraud—and of course you cannot contend that the Superior Court records of the State of California are a fraud, but that there was a fraud practiced upon that Court——

Mr. Belcher: No such contention here, your Honor.

The Court: Well, if you admit that I don't think that it is necessary for the Court to go into this whole record.

Mr. Belcher: It does seem to me, and it seemed to me at the time the matter was first taken up by the Immigration officials with me, that that was the hurdle that they had to overcome. I couldn't for the life of me see why the Immigration officials could not and are not bound.

The Court: Have you read this Finding 7. I guess they label it, on page 4, Nunc Pro Tunc Birth Certificate, order—— [9]

Mr. Belcher: Finding No. 4?

The Court: No. 7 on page 4. I shall read it and then get it in the record in this manner:

“In 1930 the applicant filed a petition in the Superior Court at San Francisco for adjudication of birth in San Francisco. Exhibit 1.” That evidently is this record here. “The applicant testified during his original examination that testimony was taken from himself and mother and ‘I don't remember anyone else.’ On examination about four months later he says

that his two brothers also testified at the hearing; that the trial lasted about one hour and was completed during the forenoon. The birth certificate shows that the applicant was born on Commercial Street, San Francisco. He was given the opportunity to explain why his birth certificate shows birth on Commercial Street instead of Grant Avenue, but declined to answer. He again said that his mother told him that he was born on Grant Avenue.

“It is apparent that the proceedings in the Superior Court were entirely *ex parte* and not contested. The Order merely says that on December 5, 1900, a male child named Dong Yee Yuen was born to Dong Hung and Leon Shee in San Francisco. Photograph of the applicant and his alleged mother are attached to the Order, but no reference is made in the Order or Petition to the photographs. Considering the court record on its face value the Court did not hold that this particular applicant was born in San Francisco, but merely held that a person named Dong Yee Yuen was born in San Francisco.

“Notwithstanding any discrepancies appearing in the present proceedings, it is not believed that the Superior Court record is any evidence that the applicant was [10] born in San Francisco. Similar Orders from the same Court and birth certificates were presented by Wong Foon and Wong Quai in their applications for return

citizen's certificates, and it was held on appeal that such Orders and birth certificates did not prove birth in San Francisco. See Central Office——”

Well, with that conclusion, this Court cannot in any way agree. A solemn decree from a state court of general jurisdiction must be accepted for the recitations contained in it, and this being supported by a photograph of the individual, cannot lightly be brushed aside by the administrative branch of the Government, and I feel under this fact alone, Mr. Belcher, that I must sustain the application for a writ and direct that the petitioner be discharged from custody, by reason of the fact that he has established by competent proof that he is an American-born citizen.

The matter of taking an American-born citizen, irrespective of what his nationality or his origin in nationality might have been, was so well pointed out by Judge Denman in a case that is somewhat similar here, and particularly now that the Chinese race are no longer excluded from the rights of aliens that were denied to them by the earlier Chinese exclusion laws—those have all been repealed, and there is certainly no reason at all to approach a problem of this kind in any other manner than we would that of any other nationality, and here, whatever the motives were, this petitioner saw fit, some years during the lifetime of his mother, to, in compliance with the laws of the State of California, file his petition and secure a judicial deter-

mination of the place of birth, and to me it establishes clearly that he has all the rights of a natural-born citizen, being such himself, and so judicially determined to be, unless you could attack this decree on the ground of fraud. [11]

Mr. Belcher: Apparently that is not the theory.

The Court: The finding here, of the Immigration Service, is that it might have been somebody else, but the Court decrees are too important and too serious a matter to be set aside by an assumption they might have been in error, so you may prepare findings, based upon this single ground. I am not going into the others.

Certificate

I, Russell N. Anderson, official court reporter for the above-entitled court, do hereby certify that the foregoing is a true and correct transcript of the matters therein set out.

/s/ RUSSELL N. ANDERSEN. [12]

[Western Union Night Letter]

Honorable Joseph Savoretti
Assistant Commissioner,
Immigration & Naturalization
Franklin Trust Building
Philadelphia, Pennsylvania

This wire sent knowledge San Francisco office. Numerous cases pending veterans holding final decrees Superior Court, California, duly finding each

born San Francisco or elsewhere California, all in confinement. I represent three cases, now trying one before Board. Adequate preparation meet issues of fact raised by Board impossible because applicants in detention. Attention invited following rule in Yuen Boo Ming vs. United States 103 Federal Second 355: "The compulsion of the preparation of his or her affirmative proof while in confinement is an affront to the ordinary citizens concept of due process." Therefore hearings while applicants in confinement invalid since confinement violative Constitutional rights. Respectfully request applicants forthwith be released bond or own recognizance.

GUS C. RINGOLE,

Attorney

709 Central Tower

San Francisco, California

[Western Union Night Letter.]

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Philadelphia Penn 14 701 P

Gus C Ringole, Esquire

709 Central Tower Bldg. SFran.

Reference is made to your telegram November 6 regarding the detention of applicants for admission at San Francisco pending determination of citizenship status. After careful consideration of matter it is deemed impracticable to grant your request for

release of these persons from custody pending disposition their cases.

JOSEPH SAVORETTI,
Assistant Commissioner,
Immigration and Natz Svc.

U. S. Department of Justice
Immigration and Naturalization Service
San Francisco 11, California

November 26, 1947

1300-63804, 63805, 63806, 60052, 60053, 58482, 58483

Mr. Gus C. Ringole

Attorney at Law

Central Tower

San Francisco, California

Dear Sir:

Re: Wong Fon, Wong Yock and alleged wife Chin
Pui Ching, Fong Fook Lee and alleged wife
Ng May Sang, Mar Foo Ling alias Frank Mar
and alleged wife Ong Gew Fung

Reference is made to your letter of November 19, 1947, wherein you request that the above-named individuals be released from detention under the same conditions as the order entered in the case of You Yut Gee by the United States District Court at San Francisco, California.

You were advised informally at that time that this office could not under any outstanding law or regulation grant your request, but that in view of the circumstances your letter had been transmitted,

by air mail, to the Central Office of this Service, Philadelphia, Pennsylvania, for further consideration.

We have now been advised by our Central Office, in a telegram dated November 26, that your application for release of all these aliens has been denied.

Very truly yours,
For the District Director
San Francisco District

/s/ JOSEPH S. HERTOGS,
Assistant Chief,
Entry and Departure Section.

[Endorsed]: Filed Dec. 8, 1947. [15]

In the United States District Court in and for
the Northern District of California, Southern
Division

No. 27790G

In the Matter of
LEE FONG FOOK,
On Habeas Corpus.

ORDER TO SHOW CAUSE ON PETITION
FOR WRIT OF HABEAS CORPUS

Upon reading and filing the verified petition herein of G. C. Ringole, petitioner herein, praying

for the issuance of a writ of habeas corpus, good cause appearing therefor,

It Is Hereby Ordered that I. F. Wixson, District Director, Immigration and Naturalization Service, San Francisco, California, be and appear before this Court on the 15th day of December, 1947, at the hour of 10 a.m. of said day, to show cause, if any he has, why a writ of habeas corpus should not issue in this matter as herein prayed.

It Is Hereby Further Ordered that a copy of this order be served upon said I. F. Wixson, District Director, Immigration and Naturalization Service, San Francisco, California, or such other person having said detained in custody as an officer or subordinate to said I. F. Wixson, District Director, Immigration and Naturalization Service, San Francisco, California.

Dated: San Francisco, California, December 8, 1947.

LOUIS E. GOODMAN,
Judge.

[Endorsed]: Filed December 8, 1947. [17]

[Title of District Court and Cause.]

ORDER TO ISSUE WRIT OF HABEAS
CORPUS

Good cause appearing therefor,

It Is Hereby Ordered that a writ of habeas corpus issue herein to I. F. Wixson, District Director,

Immigration and Naturalization Service, San Francisco, California, commanding him to produce before the above Court the body of said Lee Fong Fook on to wit: the 15th day of December, 1947, at the hour of 10 a.m. of said day, and to make due return to said writ at any time upon the morning of said day.

Done in Open Court this 8th day of December, 1947.

LOUIS E. GOODMAN,
District Judge.

[Endorsed]: Filed December 9, 1947. [18]

[Title of District Court and Cause.]

WRIT OF HABEAS CORPUS

The President of the United States of America to
I. F. Wixson, District Director, Immigration
and Naturalization Service, San Francisco, Cali-
fornia, Greeting:

You are hereby commanded that the body of Lee Fong Fook by you restrained of his liberty as it is said, detained by whatsoever names the said Lee Fong Fook may be detained, together with the date and cause of his being taken and detained, you have before the Honorable Louis E. Goodman, Judge of the United States District Court in and for the Northern District of California, Southern Division, at the courtroom of said Court in the Post Office Building, Seventh and Mission Streets in the

City and County of San Francisco, State of California, at 10 o'clock a.m. on the 15th day of December, 1947, then and there to do, submit to and receive whatsoever the said Judge shall then and there consider in that behalf; and have you then and there this writ.

Witness the Honorable Louis E. Goodman, Judge of the United States District Court, at San Francisco, California, this 9th day of December, 1947.

[Seal]

C. W. CALBREATH,

Clerk of the Above Court,

By L. C. JACOBSEN,

Deputy Clerk.

[Endorsed]: Filed December 9, 1947. [19]

[Title of District Court and Cause.]

RETURN TO WRIT OF HABEAS CORPUS

Now comes I. F. Wixson, as District Director, Immigration and Naturalization Service, Port of San Francisco, and, making a return on the Writ of Habeas Corpus heretofore issued by this Court on December 4, 1947, produces the body of the petitioner, Lee Fong Fook, before this Court and states:

I.

The petitioner is detained in custody by respondent as an applicant for admission to the United States at the Port of San Francisco who did not

appear to the Examining Immigrant Inspector at the Port of San Francisco to be clearly and beyond a doubt entitled to enter, and in whose case an Order of Exclusion was made by a Board of Special Inquiry, regularly sworn and convened, pursuant to the [20] provisions of 8 U.S.C. 153, the said Order being dated November 28, 1947.

II.

The petitioner has indicated his intention of applying for a review of the finding of the Board of Special Inquiry ordering his exclusion to the Commissioner of Immigration and Naturalization, as is provided by 8 U.S.C. 153.

III.

There is attached hereto and marked "Exhibit A" a certified copy of the record of the Board of Special Inquiry hearing in the case of the petitioner and of his wife, Ng May Sang.

Respondent prays that the Writ of Habeas Corpus heretofore issued be discharged and the petitioner remanded to his custody.

I. F. WIXSON,

District Director, Immigration and Naturalization
Service, Port of San Francisco, California.

[Endorsed]: Filed December 12, 1947. [21]

[Title of District Court and Cause.]

TRAVERSE TO RETURN

Comes now petitioner and files this as traverse to the return to writ of habeas corpus in the above cause, filed by I. F. Wixson, District Director, Immigration and Naturalization Service, Port of San Francisco:

I.

The examining Immigration Inspector at the Port of San Francisco who examined said Lee Fong Fook, did so contrary to and in violation of the Administrative Procedure Act, Section VI, reading in part as follows:

“Except as otherwise provided in this Act—

(A) Appearance: Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel * * * Every party shall be accorded the right to appear in person or by or with counsel * * *

(B) Investigations: No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law.”

That the said Lee Fong Fook was during the entire examination [22] by said Immigration Inspec-

tor denied the right to counsel and to be accompanied, represented or advised by counsel; that said inspection and said examination was wholly void and thus the Board of Special Inquiry was not regularly, or at all, sworn and/or convened.

II.

Petitioner has indicated his intention of applying for a review of the findings of the Board of Special Inquiry ordering his exclusion by the Commissioner of Immigration and Naturalization, but at the same time demanded the admission to bail of said Lee Fong Fook so that pending said appeal the said Lee Fong Fook would be given the opportunity to find witnesses for his defense and to obtain a re-hearing and re-opening of the case, all as authorized by applicable regulations and the practice of the Immigration and Naturalization Service.

That petitioner files this traverse, not only as such, but as an amendment to his petition for writ of habeas corpus herein.

III.

Petitioner places of record his objection to all of the testimony set forth in Respondent's Exhibit A, except proof of his marriage to his wife, and except the certified copy of the Decree of the Superior Court of the State of California, in and for the City and County of San Francisco, the final decree adjudicating his birth in San Francisco, and his honorable discharge and proof of his identity as being the holder of said honorable discharge and the

person mentioned in said decree on the ground that the testimony is incompetent and immaterial, and on the further ground that all the proceedings of the said Board are void because predicated upon the investigation and inspection of the Immigration Inspector at the Port of San Francisco, done and made in violation of the Administrative Procedure Act as hereinabove quoted. [23]

Petitioner avers that there are no facts to be considered by the Court, but that the following questions of law arise:

1. Is the decree of the Superior Court of the State of California, in and for the City and County of San Francisco, dated August 14, 1944, in Proceeding No. 331145, decreeing that said detained was born in San Francisco, binding upon the Immigration and Naturalization Service (*Dong Yee Yuen vs. Bonham*, Oral Opinion attached to petition)?
2. Is the hearing before the Board of Special Inquiry of the detained invalid by virtue of the above quoted provision of the Administrative Procedure Act?
3. Is the hearing before the Board of Special Inquiry, if otherwise valid, void and of no force and effect because said detained was kept in confinement throughout said hearing and thus denied due process of law (*Yuen Boo Ming vs. United States*, 103 Federal Second 355)?
4. Are the proceedings of the Board unfair and arbitrary, not only for the above reasons but

because testimony of witnesses was inserted in the record taken by the Board itself outside of the hearing and presence of the detained, and without permitting him the right to cross-examine the said witnesses?

5. Is detained presentlyailable?

Respectfully submitted,

/s/ G. C. RINGOLE, Petitioner,
Attorney for Lee Fong Fook.

[Endorsed]: Filed December 15, 1947. [24]

In the United States District Court, for the Northern
District of California, Southern Division

No. 27790-G

In the Matter of

LEE FONG FOOK,

On Habeas Corpus.

R. C. Ringole, 709 Central Tower, San Francisco,
Calif., Attorney for Lee Fong Fook.

Frank J. Hennessy, United States Attorney; Edgar B. Bonsall, Assistant United States Attorney, attorneys for Respondent.

OPINION AND ORDER

Goodman, District Judge.

On August 5, 1947, petitioner arrived at the Port of San Francisco aboard the steamship "General

Meigs'' on a return trip from China. He was refused entry to the United States by Immigration officials, and ever since arrival has been and still is detained in their custody. While he was in such detention, an Immigration Board of Special Inquiry [25] (8 USC 153) conducted hearings on a number of different days in October and November of 1947, at all of which petitioner was represented by counsel of his choosing. On December 1, 1947, the Board of Special Inquiry denied petitioner admission into the United States on the ground that he was an alien not eligible for admission. (Immigration Act of 1924, Sec. 13.) Thereupon petitioner entered an appeal to the Commissioner of Immigration and Naturalization. Pending the appeal and on December 8, 1947, petitioner filed a petition for writ of habeas corpus in this court. Therein petitioner alleged that he was an American citizen by birth and that the respondent was unlawfully restraining him of his liberty. For the purpose of inquiring into the cause of the alleged restraint of liberty (28 USC 452), the Court issued a writ of habeas corpus and directed respondent to produce the body of the petitioner at a date fixed in the writ. Respondent complied with the writ and also filed a return in which the proceedings of the Board of Special Inquiry and the evidence there considered were set out. No evidence was presented to the Court upon the hearing, except the affidavit of petitioner's counsel in support of his application for release pending the administrative proceedings before the Immigration authorities, and the cause was

submitted upon the petition, the return, the traverse thereto, and upon briefs to be filed, all of which are now before the Court.

There is no dispute about the following facts:

At least from early childhood, petitioner was continuously a resident of the United States. On September 23, 1942 he was inducted into the United States Army. On February 10, 1943, he was honorably discharged from the Armed Forces. His certificate of discharge recites that he was born in San Francisco, State of California, and was 41½ years of age at time of enlistment. His army service was entirely in the United States. On August 14, 1944, he obtained in the Superior Court of the State of California, in and for the City and County of San Francisco, under the provisions of the Health and Safety Code of the State of California, (Sections 10600 etseq.) an order of said court establishing the fact that he was born on the 6th day of April, 1901, in San Francisco, California. On December 2, 1946, United States Passport No. 159067 was issued to petitioner by the State Department of the United States wherein it was stated that he was an American citizen. Thereupon petitioner left the continental United States for a visit to China. Upon his attempted re-entry on August 25, 1947, the passport as well as certified copies of his Army discharge and the State Court order establishing birth were tendered to the Immigration officials as evidence of his right to re-enter the United States.

At the hearings conducted by the Board of Special Inquiry, the petitioner and his wife, whom he had married on his visit to China, as well as the witness who testified on petitioner's behalf in the State Court proceeding to establish his birth, were questioned. The testimony raised an issue as to whether petitioner had in fact been born in the United States. The Board of Special Inquiry determined this issue adversely to petitioner. This was clearly within the power of the Immigration Authorities. Petitioner was not entitled to a judicial hearing as to his right to admission. (*Wong Wing Sing et ux.v. Nagle*, 299 F. 601; (9th Cir.); *Ex Parte Yoshimasa Nomura*, 297 F. 191 (9th Cir.); *Ex Parte Fong Chow Oi*, 15 F. 2d 209 (D.C. Cal.)

I.

At the hearing in this Court, petitioner contended, as he did through his counsel before the Board of Special Inquiry, that the decree of the Superior Court of the State of California has established petitioner's birth in the United States, and that it was beyond the authority and power of the immigration officials to pursue any inquiry as to the decree's validity. The argument of the petitioner in this regard is that the State Court decree is an adjudication of petitioner's citizenship by which the United States is bound under the Full Faith and Credit provision of the Constitution (Const. Art. IV), as extended by statute to the Federal Courts. (28 USC 687.)

Neither reason nor authority support this contention.

The proceeding authorized by California state law for the establishment of the fact of birth is not an adversary proceeding, save and except that the statute requires that notice of the hearing be given to the District Attorney of the county wherein the hearing is had. The United States not being a party to such proceeding, nor having consented thereto, is not bound by the state court adjudication. Particularly is this so as to the administration of laws of the United States, which it alone enforces. (Const. Art. I, Sec. 9, Clause 1.) If the California Court had granted petitioner a decree of naturalization, pursuant to its authority so to do expressly granted by Congress (54 Stat. 1140; 8 USC 701), then of course such a decree would be fully binding on the United States and could only be attacked in the manner provided by Federal Statute. (8 USC 738). But jurisdiction to adjudicate the citizenship status of a United States resident has never been conferred by Congress on state courts. Consequently, any state court [28] judgment purporting to exercise that jurisdiction cannot, to that extent, claim of the Federal Courts full faith and credit.

The state court decree establishing birth is no more conclusive upon the United States as to citizenship or as to the right of entry into the United States than would be the finding of a state court in a proceeding between private litigants wherein it might be necessary or proper in deciding property or personal rights to find the date or place of birth

of one of the litigants before the court. In my opinion the decree of the state court is evidence of petitioner's birthplace but not conclusive proof of his citizenship. The United States has the full right to inquire into the facts upon which American citizenship is claimed, when entry into the United States is sought; and the burden of proving that citizenship is upon the person seeking entry.¹ If this were not so, the doors would be wide open to fraud upon the part of entrants in the claim of citizenship or fraud in obtaining state decrees as to birth² *Lee Leong v. U. S.* 217 Fed. 48; *Ex Parte Lee*, 49 Fed. 2d 486. 468.

Hence the claim that the petitioner should be unconditionally released from custody, upon the ground of the conclusiveness of the state court decree, is rejected.

II.

In further support of his claimed right to unconditional release from custody, petitioner contends that he was not accorded due process by the Immi-

¹Upon his attempted entry, petitioner was subject to the immigration laws as if he had never resided in the United States. (*U. S. ex rel. Stapf v. Corsi*, 287 U. S. 129.)

²The record here shows that the sole witness for the petitioner in the state court proceedings to establish birth, there testified to having seen petitioner immediately after he was born in San Francisco in 1901. This same witness later testified before the Immigration Authorities that he saw petitioner for the first time in 1911 or 1912 when the latter was about three or four years old.

gration Authorities in that the was not represented by counsel at the preliminary investigation and because of the admission at the hearing before the Board of Special Inquiry of alleged incompetent and improper evidence. These contentions, however, are pre-mature, inasmuch as the administrative proceedings have not yet been completed. The writ will not generally lie as to errors or irregularities in administrative proceedings themselves until petitioner has fully pursued the administrative remedies provided by law. (U. S. Tuck, 194 U. S. 161; U. S. ex rel. Loucas v. Comm. of Im. 49 Fed. 2d 473.) Final determination may be favorable to petitioner or a rehearing may be ordered, thus providing an opportunity for correction of any possible errors theretofore committed. Primarily, however, any such errors or irregularities must be viewed against the background of the entirely completed administrative proceedings before it can be determined judicially whether or not they have in fact impaired the fairness and due process of such proceedings.

III.

In his petition for the writ, petitioner claimed that because of his confinement by the immigration officials, he was unable to obtain witnesses on his behalf and he prayed to be released on bail until the final determination of the administrative and court proceedings. But at the hearings before this Court this plea. However, this contention was re-asserted in petitioner's briefs and the issue thus raised was argued by both sides. Under the special circum-

stances of this case and in furtherance of justice in the conduct of the attacked administrative proceeding, it should be decided.

Petitioner is not an alien seeking entry to the United [30] States for the first time. Indisputably he has lived in the United States continuously from very early youth. He served honorably in the armed forces. He was accepted in the armed forces as an American citizen. He could have resided here, citizen or not, the rest of his life. He is entitled at least to the presumption that he is a citizen of the land in which he resided. *Shelton v. Tiffin*, 47 U. S. 162; *Ex Parte Delaney*, 72 F. Supp. 312. By the happenstance of his visit to China and his attempted re-entry, he may never be permitted to cross the barrier into the land where he has lived so long and which he has honorably served. By this same happenstance, he must prove his American citizenship in order to pass the barrier. He must reach into the remote past. In justice to him, he should have some liberty, if the circumstances warrant it, to obtain witnesses to prove the fact, if it be such, of his birth.³

These and similar considerations have prompted courts, to recognize power in themselves, independent of statute, to grant in habeas corpus proceedings, temporary release to persons detained by

³Although the proceedings before the Board of Special Inquiry have been concluded, the case may be reopened for the taking of additional evidence. (Immigration and Nationality Laws and Regulations, Sec. 136.5, 136.6.)

government authorities for deportation. In *re Lum Poy*, 128 Fed. 974; *Principe v. Ault*, 62 F. Supp. 279; *Wright v. Henkel*, 190 U. S. 40. Such courts have spoken of this type of liberty as "release on bail." This, in my opinion, is not wholly accurate. Nor to release on bail is to unnecessarily usurp and invade the reach of the writ of habeas corpus. Nor need the power of the court to grant such form of release be sought in the law of recognizance. For the habeas corpus statute itself empowers a Federal Judge to make such order as justice and law requires. (28 USC 461.) Therefore, wherever circumstances impel the conclusion that due process in any particular administrative immigration proceeding cannot be achieved without allowing the detained person some liberty of action wherewith to fully prepare his case, temporary release for that particular purpose has statutory sanction. Release from restraint under writ of habeas corpus need not be full or unconditional. The type and character of such release may in itself be less or different than complete release.⁴

It is my opinion that the court, under 28 USC 461, has power to grant conditional or partial release from restraint, wherever required by the cir-

⁴E. G., the writ of habeas corpus *ad prosequendum* and the writ of habeas corpus *ad testificandum* each contemplate a release for a limited purpose, without full discharge from custody. Likewise, in habeas corpus proceedings, prisoners serving under defective sentences have been ordered returned to the district where convicted for correction of sentence. See *Bledsoe v. Johnston*, 58 Fed. Supp. 129.

cumstances of the case in order to cure a mischief not otherwise reachable, which would to any extent taint the detention with unfairness. And if detention during the course of the administrative proceedings is of the essence of such unfairness, it would be unjust to await termination of the proceedings in reliance upon the concept that the petitioner might finally prevail.

For the reasons heretofore stated, the unconditional release of petitioner from the custody of the Immigration Officials is refused without prejudice.

The respondent is ordered to produce the petitioner in Court on Monday, February 2, 1948 at 2 o'clock p. m. for a hearing to determine whether petitioner should be released upon such conditions and for such a period of time as may be proper and in furtherance of justice.

Dated: January 23, 1948.

LOUIS E. GOODMAN,
United States District Judge.

(Entered in Civil Docket Jan. 27, 1948.)

[Endorsed]: Filed Jan. 26, 1948. [32]

[Title of District Court and Cause.]

ORDER DENYING PETITION FOR WRIT
OF HABEAS CORPUS

In the above cause, a petition having been filed on behalf of the above named Lee Fong Fook, for a Writ of Habeas Corpus, and thereafter the Court having issued a Writ of Habeas Corpus to which a return was duly made by I. F. Wixson, District Director Immigration and Naturalization Service, San Francisco, California, and a traverse thereafter having been duly filed on behalf of the said detained, Lee Fong Fook, and the matter having been heard and submitted to the Court, and the Court having filed its opinion herein on January 26, 1948,

Now, Therefore, upon the grounds stated in said opinion, It Is Hereby Ordered and Adjudged, and this Court does Hereby Order and Adjudge that the said petition be and the same is Hereby Denied, and said Lee Fong Fook be and he is hereby remanded to the custody of the said I. F. Wixson District Director Immigration and Naturalization Service, San Francisco, California, except that he may be conditionally and temporarily released only, upon posting bond in the sum of One thousand (\$1,000) Dollars.

Done in open Court this 6th day of February, 1948.

LOUIS E. GOODMAN,
District Judge.

(Entered in Civil Docket Feb. 7, 1948.)

[Endorsed]: Filed Feb. 6, 1948. [33]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the above named Lee Fong Fook does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order made and entered herein, February 6, 1948, denying the petition herein for a writ of habeas corpus upon his behalf and from the whole thereof.

Dated: February 9, 1948.

/s/ G. C. RINGOLE,
Attorney for Lee Fong Fook.

Receipt of a copy of the foregoing notice of appeal is hereby acknowledged this 9th day of February, 1948.

FRANK J. HENNESSY,
United States Attorney.

By DANIEL O. DEASY,
Assistant United States
Attorney.

Attorneys for Respondent.

[Endorsed]: Feb. 9, 1948.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the above named Lee Fong Fook does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the opinion and order made and entered into herein January 26, 1948, and from the whole thereof.

Dated: February 10, 1948.

/s/ G. . RINGOLE,

Attorney for Lee Fong Fook.

Receipt of a copy of the foregoing notice of appeal is hereby acknowledged this 10th day of February, 1948.

FRANK J. HENNESSY,
United States Attorney.

[Endorsed]: Filed Feb. 10, 1948.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

To the Clerk of the United States District Court
for the Northern District of California, Southern
Division:

It is respectfully requested that the following be submitted to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit:

1. Petition for Writ of Habeas Corpus on behalf of the above named Lee Fong Fook filed.

2. Order to Show Cause Why Writ of Habeas Corpus Should not issue.
3. Writ of Habeas Corpus.
4. Return of Respondent, I. F. Wixson, District Director, Immigration and Naturalization Service, San Francisco, California.
5. Traverse of Lee Fong Fook.
6. Opinion of Court filed January 26, 1948.
7. Order denying petition for Writ of Habeas Corpus.
8. Memorandum of points and authorities on behalf of both parties herein.
9. Exhibits including, but not limited to, honorable discharge, U. S. Army, of Lee Fong Fook, Order establishing birth of Lee Fong Fook by Superior Court, San Francisco.
10. Notices of Appeal.

Dated: February 10, 1948.

/s/ G. C. RINGOLE, per A.H.G.J.,
Attorney for Lee Fong Fook.

Receipt of a copy of the foregoing designation of record on appeal is hereby acknowledged this 10th day of February, 1948.

/s/ FRANK J. HENNESSY,
United States Attorney.

[Endorsed]: Filed Feb. 10, 1948.

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 38 pages, numbered from 1 to 38, inclusive, contain a full, true, and correct transcript of the records and proceedings in the matter of Lee Fong Fook on Habeas Corpus No. 27790 G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$4.40 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 12th day of February A. D. 1948.

[Seal]

C. W. CALBREATH,
Clerk.

/s/ E. H. NORMAN,
Deputy Clerk.

Yut Ying

MAIDEN SURNAME OF MOTHER

3. DATE OF BIRTH April 6 1907
MONTH DAY

3. DATE OF BIRTH ~~April 6 1901~~^{NOV 9}_{DAY}

Male

5. COLOR OR RACE

Chinese

FATHER OF CHILD

MOTHER OF CHILD

Lee Sung Kay

8. FULL MAIDEN NAME _____

Yut Ying

china

9. BIRTHPLACE

china

STATE OR COUNTRY

STATE OR COUNTRY

11. ABSTRACT OR SUPPORTING EVIDENCE

10. SIGNATURE OF REGISTRANT.

11. ABSTRACT OR SUPPORTING EVIDENCE

NAME AND KIND OF DOCUMENT (INCLUDING BY WHOM ISSUED, AND SIGNED AND DATE OF ISSUE)

DATE ORIGINAL DOCUMENT WAS MADE

^Aoral testimony of Friend who knows the facts
^Bconcerning the birth of applicant in San Francisco

San Francisco

12. INFORMATION CONCERNING REGISTRANT AS STATED IN DOCUMENT

BIRTHDATE OR AGE

BIRTHPLACE

NAME OF FATHER

FULL NAME OF MOTHER

13. DATE OF FILING:

14. REGISTRAR

Offered for filing pursuant to order of the Superior Court of San Francisco, County

made the 14th day of August

A.D. 1944

A.D. 1944, establishing of record the fact of birth in the

State of California

In the Superior Court of the County of San Francisco
State of California

IN THE MATTER OF THE PETITION OF

Lee F. Fook

To Establish the BIRTH OF

Lee F. Fook

331145

Dept. 3

ORDER ESTABLISHING
FACT OF BIRTH

The verified petition of Lee F. Fook

to establish the birth of Lee F. Fook

having been filed herein on the 8th day of August A. D. 1944 and such petition

having by an order of court been duly set for hearing on the 14th day of August A. D. 1944

at the hour of 10 o'clock A. M. of said day; and now on said day said matter coming on regularly for hearing

and it appearing to the satisfaction of this court from the evidence introduced that the said

Lee F. Fook petitioner herein is beneficially interested in establishing of record

the fact of the birth of said Lee F. Fook

in that Petitioner and Lee F. Fook are the same person

that a copy of the said petition was upon the 8th day of August A. D. 1944

served upon Edmund G. Brown the district attorney of the

county of San Francisco

; and it appearing that on the 6th

day of April A. D. 1901, a male child was born

to Lee Sung Kay father

and Yut Ying mother

that the name of said child is Lee F. Fook

that said birth has not been registered in conformity with the provisions of law in effect at the time of said birth; and no one appearing at said hearing to oppose the making of this order:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that on the 6th day of April

A. D. 1901, a male child of the name of Lee F. Fook

was born to Lee Sung Kay father

and Yut Ying mother

at the City and county of San Francisco State of California

Done in court this 14th day of August A. D. 1944

THOS. M. FOLEY

Judge of the Superior Court

THE ANNEXED INSTRUMENT IS
A CORRECT COPY OF THE ORIGINAL ON FILE IN MY OFFICE.

ATTEST:

NOTE.—Before filing CERTIFIED insert in the certificate form below, as of the DATE OF THE BIRTH, the personal and statistical particulars required for the records of the State Registrar of Vital Statistics. Certified copies of the above order must be delivered to the Local Registrar of Vital Statistics and to the State Registrar of Vital Statistics.

AUG 14 1944

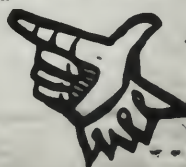
AUG 14 1944

ENDORSED
FILED

H. A. van der Zee, Clerk
H. Brunner
Deputy Clerk

H. A. VAN DER ZEE, COUNTY CLERK OF SAN FRANCISCO, AND EX-OFFICIO CLERK OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO.

DEPUTY



MARGIN RESERVED FOR BINDING
WRITE PLAINLY WITH UNFADING INK—THIS IS A PERMANENT RECORD

FORM 30 BIRTH RECORD
STATE NOTARY OFFICE

Honorable Discharge
from
The Army of the United States



TO ALL WHOM IT MAY CONCERN:

This is to Certify, That* _____ **Lee F. Fook** _____

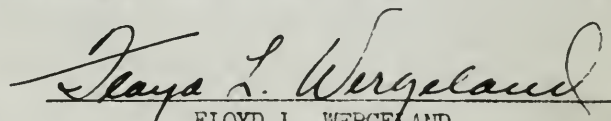
† 39397855, Private, Co B, 65th Med Tng Bn, 15th Med Tng Regt, MRTC _____

THE ARMY OF THE UNITED STATES, as a TESTIMONIAL OF HONEST
AND FAITHFUL SERVICE, is hereby HONORABLY DISCHARGED from the
military service of the UNITED STATES by reason of ‡ Section VIII, AR 615-360.

Said _____ **Lee F. Fook** _____ was born
in _____ San Francisco _____, in the State of _____ California _____

When enlisted he was 41 6/12 years of age and by occupation a _____ Farm Laborer _____
He had _____ brown _____ eyes, _____ black _____ hair, _____ dark _____ complexion, and
was _____ 5 _____ feet _____ 5 1/2 _____ inches in height.

Given under my hand at _____ Camp Barkeley, Texas _____ this
10th day of February _____, one thousand nine hundred and _____ Forty-three _____


FLOYD L. WERGELAND
Lieutenant Colonel, Medical Corps

Commanding

EXHIBIT 6 - SF 1300-60052-3

See AR 345-470.
*Insert name; as, "John J. Doe."
† Insert Army serial number, grade, company, regiment, or arm or service; as "1620302"; "Corporal, Company A, 1st Infantry"; "Sergeant, Quartermaster Corps."
‡ If discharged prior to expiration of service, give number, date, and source of order or full description of authority therefor.
18-10608
W. D., A. G. O. Form No. 55
April 30, 1941



ENLISTED RECORD

OF

Fook Lee F. 39397855 Private
(Last name) (First name) (Middle Initial) (Army Serial No.) (Grade)
Enlistment inducted,¹ September 23, 1942, at Sacramento, California
Completed 0 years, 4 months, 19 days service for longevity pay
Prior service:² None

Office of the Finance Officer
Camp _____ as

Paid in Full \$ 98.62

On FEB 10 1943

By: M. L. Murphy, Major, F.D.

Noncommissioned officer: Never

Qualification in arms:³ Not armed

Horsemanship: Not mounted Army specialty: None

Attendance at: None

(Name of noncommissioned officers' or special service school)

Battles, engagements, skirmishes, expeditions: None

Decorations, service medals citations: None

Wounds received in service: None

Date and result of smallpox vaccination:⁴ October 8, 1942. Immune.

Date of completion of all typhoid-paratyphoid vaccinations:⁴ November 18, 1942.

Date and result of diphtheria immunity test (Schick):⁴ None

Date of other vaccinations (specify vaccine used):⁴ Tetanus Toxoid completed January 14, 1943.

Physical condition when discharged: Good Married or single: Single

Character: Excellent

Remarks:⁵ No time lost under AW 107. Soldier entitled to travel pay.

Not recommended for reenlistment or reinduction

FOR HON. DISCH. MIL. PERSONNEL ISSUED THIS THE

4 DAY OF May 1944

S. B. RUSSELL, 1st Lt., A.U.

ADJUTANT

Print of Right Thumb

Signature of soldier: Lee F. Fook

J. M. McClelland, WOJG, AUS
Asst Chief, Enl Pers Sec

Enclosing

¹ Enter date of induction only in case of trainee inducted under Selective Training and Service Act, 1940 (Bull. No. 25, W. D., 1940); in all other cases enter date of enlistment.

² For each enlistment give company, regiment, or arm or service, with inclusive dates of service, grade, cause of discharge, number of days lost under AW 107 (none, so state), and number of days retained and cause of retention in service for convenience of the Government, if any.

³ Give date of qualification, and number, date, and source of order announcing same.

⁴ See paragraph 6, AR 40-215.

⁵ Enter periods of active duty of enlisted men of the Regular Army Reserve and the Enlisted Reserve Corps and dates of induction into Federal Service in the case of members of the National Guard.

[Endorsed]: No. 11860. United States Circuit Court of Appeals for the Ninth Circuit. Lee Fong Fook, Appellant. vs. I. F. Wixon, District Director, Immigration and Naturalization Service, Port of San Francisco, Appellee. Transcript of Record. Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

Filed February 17, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11860

In the Matter of
LEE FONG FOOK,

On Habeas Corpus.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON THE
APPEAL

Comes now Lee Fong Fook, appellant in the above entitled matter, through his attorney, G. C. Ringole, and states as his points on which he intends to rely on the appeal the following:

1. That the petition for writ of habeas corpus on behalf of appellant should have been granted and appellant, Lee Fong Fook, absolutely discharged from the custody of Respondent I. F. Wixson, District Director, Immigration and Naturalization Service, San Francisco, California, without day.

2. That the final judgment of the Superior Court of the State of California in and for the City and County of San Francisco in favor of appellant finding, and decreeing that he was born in San Francisco, California, on April 6, 1901, was and is absolutely binding and conclusive upon the Immigration and Naturalization Service, and upon said Respondent and was and is binding and conclusive upon the District Court of the United States in and

for the Northern District of California, Southern Division.

3. That Respondent, I. F. Wixson, District Director, Immigration and Naturalization Service, San Francisco, California, was and is absolutely bound and concluded by said judgment of the Superior Court of the State of California in and for the City and County of San Francisco, finding and decreeing that appellant herein, Lee Fong Fook, was born in San Francisco, California, on April 6, 1901, and that the said judgment is not only evidence of the time and place of birth of the said appellant, Lee Fong Fook, but is conclusive evidence of the time and place of birth of said appellant.

4. That the full faith and credit clause of the Constitution extended to the Federal courts by 28 U.S.C.A. Section 687, requires the Federal courts to give full faith and credit to said judgment of the Superior Court of the State of California in and for the City and County of San Francisco finding and decreeing that said Lee Fong Fook was born in San Francisco, California, on April 6, 1901.

5. That said judgment of the Superior Court of the State of California in and for the City and County of San Francisco finding and decreeing that said appellant was born in San Francisco, California, on April 6, 1901, removes appellant, Lee Fong Fook from the jurisdiction of said Respondent I. F. Wixson, District Director, Immigration and Naturalization Service, San Francisco, California, and that said Respondent, I. F. Wixson, District Direc-

tor, Immigration and Naturalization Service, San Francisco, California, was and is without jurisdiction over said appellant and was and is without right or authority to detain him.

6. That the Honorable District Court erred in not granting the petition of said appellant absolutely, and releasing him from the custody of said Respondent without day, and erred in holding that the judgment of the Superior Court of the State of California in and for the City and County of San Francisco finding and decreeing the place and date of birth of said appellant was not absolutely binding and conclusive on the said Immigration and Naturalization Service and said Respondent and said Honorable Court, and in holding that Section 687, 28 U.S.C.A. does not compel said Court to give full faith and credit to said judgment.

/s/ G. C. RINGOLE,

Attorney for Appellant.

Receipt of a copy of the foregoing Statement of Points on Which Appellant Intends to Rely on the Appeal is hereby acknowledged this 17th day of February, 1948.

FRANK J. HENNESSY,

U. S. Attorney.

By /s/ T. SOLOMON.

[Endorsed]: Filed Feb. 17, 1948.

No. 11,860

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LEE FONG FOOK,

Appellant,

VS.

I. F. WIXON, District Director, Immi-
gration and Naturalization Service,
Port of San Francisco,

Appellee.

BRIEF FOR APPELLANT.

GUS C. RINGOLE,

709 Central Tower, San Francisco,

Attorney for Appellant.

FILED

MAR 25 1948

PAUL P. O'BRIEN, CLERK

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No. 11,860

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LEE FONG FOOK,

Appellant,

VS.

I. F. WIXON, District Director, Immi-
gration and Naturalization Service,
Port of San Francisco,

Appellee.

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

Appellant, claiming American citizenship, was held in detention in San Francisco by appellee pending hearing upon his right to enter the United States with his wife.

He caused to be filed a petition for a writ of habeas corpus with the District Court of the United States in and for the Northern District of California, Southern Division (T. 2). This Court has jurisdiction of said habeas corpus proceedings under 28 U.S.C. sections 451-453.

Jurisdiction to review the final orders of the District Court denying appellant's petition for writ of

habeas corpus (T. 31, 35, 36) is conferred upon this Court by 28 U.S.C. Sections 463 and 225. Appeals from the orders of the District Court have been duly filed (T. 37, 38).

STATEMENT OF THE CASE.

Appellant, honorably discharged veteran of the World War (T. 41) holding a final judgment of the Superior Court of the State of California in and for the City and County of San Francisco duly adjudicating his birth in San Francisco on April 6, 1901 (T. 41), arrived in San Francisco with his wife on August 25, 1947 (T. 3, 26). "At least from early childhood, he was continuously a resident of the United States." "His Certificate of Discharge recites that he was born in San Francisco, State of California, and was 41½ years of age at time of enlistment". "Indisputably he has lived in the United States continuously from very early youth. He served honorably in the Armed Forces. He was accepted in the Armed Forces as an American citizen" (Opinion District Court, T. 28, 33, 43). Pending proceedings before appellee, he caused to be filed his petition for writ of habeas corpus upon a number of grounds. The only ground material upon this appeal is the first ground of his petition (T. 2-4, 11-15). The following questions arise:

1. Is the final judgment of the Superior Court of the State of California under the full faith and credit statute absolutely and conclusively binding upon the Federal Courts?

2. Is citizenship in the United States conferred upon appellant by the Constitution, Article XIV, Section 1?

3. Does such final judgment establish at least a *prima facie* case in favor of appellant?

SPECIFICATION OF ERRORS.

1. The District Court erred in denying the petition of appellant for writ of habeas corpus and remanding him to the custody of appellee.

2. The District Court erred in refusing to release appellant from the custody of appellee unconditionally and without day, under the first ground of his petition for a writ of habeas corpus.

3. The District Court erred in holding: "in my opinion the decree of the State Court is evidence of the petitioner's birthplace but not conclusive proof of his citizenship" (T. 31).

4. The District Court erred in not holding that the judgment of the Superior Court of the State of California was conclusive proof of appellant's birth in San Francisco, California and therefore proof of his citizenship of the State and by constitutional provision his citizenship of the United States.

5. If we are in error in 4 above, the District Court erred in not holding that the judgment of the Superior Court of the State of California was *prima facie* evidence of appellant's birth in San Francisco.

SUMMARY OF THE ARGUMENT.

The case arises in the Immigration Service. It could have arisen in a different environment. The untold thousands, possibly hundreds of thousands, of judgments under the California statute establishing the fact of birth rendered in California courts in recent years were not necessarily instituted for the purpose of establishing citizenship. The statute is not a *naturalization* statute. Trust companies are interested for the purpose of determining age. National and State Social Security services are interested to determine when benefits are to be paid. War industries were obligated to secure proof of citizenship for employees and judgments to establish place and time of birth were the usual proof, and thus a Federal purpose was subserved.

The question at bar therefore resolves itself to this: Is the judgment of the courts of California absolutely binding upon Federal courts under the full faith and credit statute and the Constitution?

The distinguished Judge of the District Court predicated his decision upon the proposition that in the administration of laws of the United States which it alone enforces, since the United States was not a party to the state court proceeding and did not consent thereto, that therefore it is not bound by the state court adjudication (T. 30).

In other areas of law, such as bankruptcy, naturalization before June 29, 1906, the administration of the Internal Revenue Acts, and actions for forfeiture

under Congressional legislation for registry of ships, it has been held that the United States is bound by state adjudication. There is no reason in principle why it should not be bound by the state court judgment involved here.

We further urge that there is no power vested in the Immigration service to reverse a final judgment of a state, granting state citizenship.

ARGUMENT.

1. THE FULL FAITH AND CREDIT STATUTE, 28 U.S.C.A., SECTION 687, REQUIRES THAT THE JUDGMENT OF THE STATE COURT BE GIVEN FULL FAITH AND CREDIT IN FEDERAL COURTS.

Chapter 8, Section 10600-10607 of the Health and Safety Code of the State of California is the statutory predicate for the judgment in this case. Section 51, Political Code of California in force since 1872, provides that all persons born in this state and residing within it, with certain exceptions, are citizens of the state.

It has not been contended that either of these statutes is unconstitutional or that the state is without power to determine who of its inhabitants were born here and when. This state and others have passed like comprehensive statutes. As far as California is concerned, the proceeding is, under Section 10602, an *adversary* one. It is required that the District Attorney of the county in which the petition is filed be served, and he may appear in opposition.

This area of legislation has *never* been entered by the United States with full power to act through Federal Statutes and Bureaus; it has nevertheless permitted the states to make these determinations, as made in the case of appellant, and has provided no forum in its courts where like relief may be granted.

The fact that fraud may sometimes eventuate under the present condition is a matter for legislative cognizance. It does not change the law.

U. S. v. DiRe, Vol. 68, No. 4, Supreme Court Reporter, Jan. 15, 1948, 222, Par. V, p. 229.

Under the California Statute, however, service is made upon the District Attorney who of course has access to and contact with all investigating agencies and interested departments, State and Federal, and who, it must be assumed, will fully perform necessary duties in the public interest.

Reasons for obtaining these judgments are infinite. Some are for the purpose of determining when monies are due under a trust agreement or like document; some for pension purposes or social security benefits under State and National statutes; some to obtain work during the War in shipyards, airplane factories and in atomic bomb projects, some to get passports. The reason cannot be anticipated in the law, or by the courts. The Statute makes no limitation on this point.

Prior to the repeal of the exclusion laws (December 17, 1943), Chinese sought in the Immigration and Naturalization Service a pre-investigation of status,

eventuating in the issuance of "Form 430", for the purpose of returning here without difficulty. Since the repeal, that Service is without authority to make such investigations. Therefore, some relatively few Chinese went into the courts of the state for a judgment similar to the one involved here, to obtain a passport. The State statute of course is not a naturalization statute.

Under the full faith and credit statute, Section 28 U.S.C.A., Section 687, the constitutional provision for full faith and credit (Article IV, Section 1, of the Constitution) has been extended to the Federal courts.

Huron Corp. v. Lincoln Co., 312 U.S. 183, 193, 85 L.Ed. 725, 731;

Mills v. Duryee, 7 Cranch 481, 485, 3 L.Ed. 411, 413;

Dong Yee Yuen v. Bonham, Dist. Court, Western District of Washington, Opinion attached to Petition (T. 11-15);

In re Ross, 48 Fed. Supp. 815.

In *Mills v. Duryee*, supra, the United States Supreme Court said:

"It is manifest however that the Constitution contemplated a power in Congress to give a conclusive effect to such judgments. And we can perceive no rational interpretation of the act of Congress, unless it declares a judgment conclusive when a court of the particular state where it is rendered would pronounce the same decision."

In *In re Ross*, supra, a veteran was adjudicated insane by judgment of an Arizona State court and was hospitalized by the Veterans' Administration in Oregon. The court stated, page 816:

“This court is bound, as are other courts sitting in Oregon, to give full faith and credit to the judgment of the Arizona court.”

The attitude of the courts of California with reference to judgments of this type and their conclusive effect is indicated in *Tinn v. U. S. District Attorney*, 148 Cal. 773, a naturalization case, where Tinn, an Englishman, consented that the order be vacated and it was vacated. However upon certiorari the order was annulled.

In the *Dong Yee Yuen* case, supra, where the factual situation is identical with the case at bar, the court announced its complete approval of the position of appellant. The United States District Attorney emphatically agreed (T. 12). No appeal was taken.

Prior to June 29, 1906, the United States was not a party to a naturalization proceeding (8 U.S.C.A., Section 734(d), page 731). Jurisdiction has been conferred upon state courts by various statutes to naturalize aliens.

Act of March 26, 1790, Chapter 31, Stat. at large 103;

Tutun v. U. S., 270 U.S. 568, 70 L.Ed. 738;

In re Acorn, 1 Fed. Cas. No. 29.

In fact the Government was not only not a party, but proceedings under the then rules were highly in-

formal, and naturalization judgments were granted on *ex parte* applications. Illustrative cases of such informality follow:

U. S. v. Norsch, 42 Fed. 417, 418;

Stark v. Chesapeake Ins. Co., 7 Cranch 420,
3 L.Ed. 391;

In re Acorn, 1 Fed. Cases No. 29.

Therefore until the entire structure of naturalization was changed by the Act of June 29, 1906, the position of the Government vis-a-vis a judgment of naturalization was identical with the position of the Government relative to the State judgment under discussion. Then for the first time did the United States become a party (8 U.S.C.A., Section 734(d)).

In the state of the law prior to June 29, 1906, *In re Acorn* was decided (1 Fed. Cases, No. 29). A statute had been passed by Congress permitting the forfeiture of a vessel for its false registration by one not an American citizen. While the court held that the provisions of a subsequent Congressional enactment were mandatory with reference to the vessel in question, it proceeded to decide the questions raised by the Government in seeking a forfeiture under the prior Congressional Act.

The owner of the vessel was, in the Superior Court of the City of Chicago, naturalized in what was an *ex parte* proceeding, without notice of the Government. The decree of naturalization was granted January 27, 1866. The Government introduced testimony showing that for several years prior, the petitioner resided in

Canada, paid taxes there, and was registered there as a voter in 1863. The court stated, page 55:

“The proceeding to obtain naturalization is clearly a judicial one. A hearing is required to be had in open court, and the right can be conferred only by the judgment of the court, and upon satisfactory proof. It, therefore, has all the elements of a judgment. That it has the character and attributes of a judgment, and is equally conclusive, the authorities are entirely uniform.”

The court held the *ex parte* decree binding upon the Federal Government, even though the decree interfered with and prevented the Government from obtaining a forfeiture for the alleged improper registration of the vessel. This is a field where the Government's right to legislate is paramount under Constitutional authority (Article I, Section 8, U. S. Constitution), to regulate commerce with foreign nations and among the several states.

Pursuant to Article I, Section 8, Constitution of the United States, Congress has the power to lay and collect taxes. Under that prerogative it alone administers internal revenue acts for the collection of income taxes. There are numerous cases where state court judgments are followed despite the fact that they impinged upon or prevented the Government from collecting taxes claimed due.

Blair v. Commissioner of Internal Revenue,
300 U.S. 5, 81 L.Ed. 465;

Hoxey v. Page, 23 Fed. Supp. 905;

Nashville v. Internal Revenue, 136 Fed. (2d) 148;

Letts v. Commissioner of Internal Revenue, 84 Fed. (2d) 760, 762.

In the *Blair* case, *supra*, a question arose with reference to tax proceedings before the tax court for the taxable year 1923. After the United States Supreme Court denied relief upon certiorari, the taxpayer filed suit in the Illinois courts to determine certain questions of law as to the provisions of a trust involved in proceedings pending and undecided in the tax court with reference to certain taxable years thereafter. The United States Government was not a party to the action.

The court said at pages 9, 469:

“The question of the validity of the assignments is a question of local law. * * * The decision of the state court upon these questions is final. * * * To derogate from the authority of that conclusion and of the decree it commanded, so far as the question is one of state law, would be wholly unwarranted in the exercise of federal jurisdiction.”

In *Hoxey v. Page*, *supra*, at page 914, the court said with reference to a state decision:

“Such a decision from such a court is controlling no matter what the effect of it is upon the taxing powers of the United States.” (Citing cases.)

In the field of bankruptcy, Congress derives its authority from Article I, Section 8 of the Constitution

authorizing it to establish uniform laws on the subject of bankruptcy. There is nothing in the bankruptcy act that compels the bankruptcy court to follow a state judgment except in the matter of exemptions. While the Bankruptcy Act is a law of the United States which it alone enforces, the rule is undisputed that a judgment of a state court will be followed irrespective of its effect upon the administration of the bankruptcy laws.

In re Nordlight, 3 Fed. Supp. 486;

In re Northrup, 265 Fed. 420.

We earnestly contend therefore that in a system of law such as exists in the United States, closely integrated and highly inter-related (*Clafin v. Houseman*, 93 U.S. 130, 138), the fact that the state judgment might affect the administration of laws invested by the Constitution in Congress does not in principle militate against the binding effect of a state judgment.

The purpose of the California statute is not to impinge upon any field of Federal legislation. If perchance, in a few instances such would be the effect of the state judgment, a judgment rendered within the power of the State and binding upon the State, is nonetheless valid under the full faith and credit clause of the Constitution of the United States and must be given full faith and credit by the Federal courts.

We contend therefore that the decision in *Dong Yee Yuen v. Bonham*, set forth in full in the petition for the writ of habeas corpus herein, which inspired

the first ground set forth in the petition, is unquestionably in harmony with the entire philosophy behind the full faith and credit provision of the Constitution and the statute extending it to the Federal courts.

2. THE JUDGMENT OF THE STATE COURT ADJUDICATING PETITIONER'S BIRTH IN SAN FRANCISCO CONCLUSIVELY ESTABLISHES HIS STATE CITIZENSHIP. THE CONSTITUTION OF THE UNITED STATES ARTICLE XIV, SECTION 1, ESTABLISHES HIS UNITED STATES CITIZENSHIP.

On July 28, 1868 the 14th Amendment to the Constitution of the United States was adopted, providing that all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. In 1872 California provided by Section 51, Political Code, that citizens of the State of California are persons born in this state and residing within it, with certain exceptions. Thereafter various acts permitted inhabitants of the State to go into state courts of general jurisdiction to prove the date and place of birth. The latest legislation appears in Chapter 8, Sections 10600-10607, of the Health and Safety Code of the State of California. In the *Slaughter House Cases*, 16 Wall. 36, 21 L.Ed. 394, 408, it is said:

“* * * The distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. * * * It is quite clear then, that there is a citizenship of the United

States and a citizenship of a State, which are distinct from each other and which depend upon different characteristics or circumstances in the individual.”

The State of California, a sovereign state, is fully empowered to pass upon and determine who are its citizens. It cannot be sued without its consent but it waived its immunity by permitting its inhabitants to go into its courts by petition to determine the fact of their birth, to serve its representative, the District Attorney, appointed by statute to protect its interests and empowering him to oppose such petition. The proceeding therefore being one adversary to the State, the adjudication of the State Court, when final, is absolutely binding upon the State of California subject to be set aside in the manner and by procedure recognized by law.

Tinn v. U. S. District Attorney, 148 Cal. 773.

The judgment therefore of the California court establishes that the party is a citizen of the State of California and was born in California. He then acquires United States citizenship not by force of any Federal Court or Federal Statute but by virtue of the Constitution of the United States (Art. XIV, Sec. 1).

In re Gogal, Vol. 75, No. 2, Fed. Supp. March 8, 1948—268 at 271, declares:

“A person who is born in the United States, regardless of the citizenship of his parents, becomes an American citizen not by gift of Congress but by force of the Constitution. U.S.C.A., Constitutional Amendment 14, Section 1.”

Therefore it appears manifest that California, being bound by its own judgment duly declaring a person to be a citizen of California, and the Constitution of the United States then granting United States citizenship to him, there is no power in an administrative agency or court to deprive him of the United States citizenship conferred by the Constitution of the United States.

“The power of naturalization vested in Congress by the Constitution, is the power to confer citizenship, not a power to take it away.”

In re Gogal, supra.

By parity of reasoning the Immigration Service is without power under any authority vested in it to take away citizenship from any man duly adjudicated to be a citizen of the State. It is utterly without power to denaturalize. *Where California by solemn judgment clothes a person with State citizenship the Immigration Service is without power to reverse the judgment, strip that citizenship from him and declare that he is not a citizen of the State of California.*

3. THE JUDGMENT OF THE STATE COURT IS AT LEAST PRIMA FACIE EVIDENCE OF THE FACTS DECREED THEREIN.

We seriously contend the correctness of our views expressed herein, but if in complete error, which we do not admit, we feel that the District Court should have held as stated in 3 above. The decision states (T-31):

“* * * The decree of the state court is evidence of petitioner’s birthplace but not conclusive proof of his citizenship * * * and the burden of proving that citizenship is upon the person seeking entry.”

In this connection it must be remembered that boards of inquiry in the Immigration Service are composed of gentlemen of ability, but they are laymen. To say that the decree is evidence, without defining its weight, is to furnish no guide whatsoever as a practical matter, to the Immigration Service and ignores the legal problem of the burden of proof.

It has been held in a long line of cases that a prior determination of citizenship raises a *prima facie* case in favor of the alleged alien, whether in deportation or exclusion, though the determination is made by an administrative body, such as the Immigration and Naturalization Service.

Leong Quai Yin v. U. S., 31 Fed. (2d) 738;

Lau Hu Yuen v. U. S., 85 Fed. (2d) 327;

Chun Kock Quon v. Proctor, 92 Fed. (2d) 326;

Yuen Boo Ming v. U. S., 103 Fed. (2d) 355.

This being the rule with reference to a prior determination by an administrative agency, with how much more force is the rule applicable, where the determination is made by a sovereign state acting within Constitutional powers after service of process in accordance with law.

While the law does not require it, the practice of the state courts is to compel production of corroborating

evidence to the facts surrounding the birth and not to rely on the uncorroborated testimony of the petitioner. The Immigration Service is not an appellate department of California courts. A judgment of a court of competent jurisdiction is of equal dignity with the determination of an administrative body.

It is therefore respectfully submitted that the California statute is in no wise a naturalization statute; that the case could have arisen under an infinite number of facts and under a different environment; that said judgment is unconditional and conclusive for all purposes; that the judgment of the California court was rendered pursuant to its Constitutional authority and entitled to full faith and credit by the Federal courts; that the California judgment establishes State citizenship, United States citizenship is conferred by the Constitution; that the Immigration Service is without authority to divest petitioner of the state citizenship granted by a sovereign state.

In other fields of law, where exclusive jurisdiction is invested by the Constitution in Congress, state judgments have not been lightly regarded but have been given full force and effect. Those fields have been discussed above. The area that California has entered in passing the legislation under which the judgment here is involved was rendered is an area that Congress has not entered. Congress *can* enter it, and pursuant to Constitutional authority, any act it may pass would be paramount. It has not done so. It must be assumed that Congress asserts no objection to this type of legislation and the results that flow therefrom.

We contend, therefore, that petitioner should have been unconditionally released from custody upon the first ground of his petition; and that the judgment of the District Court with reference to that ground should be reversed and appellant discharged.

Dated, San Francisco,
March 24, 1948.

Respectfully submitted,
GUS C. RINGOLE,
Attorney for Appellant.

No. 11,860

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

LEE FONG FOOK,

Appellant,

vs.

I. F. WIXON, District Director, Immi-
gration and Naturalization Service,
Port of San Francisco,

Appellee.

BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANT.

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PAUL P. O'BRIEN,
CLERK

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No. 11,860

IN THE
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For the Ninth Circuit

LEE FONG FOOK,

Appellant,

VS.

I. F. WIXON, District Director, Immi-
gration and Naturalization Service,
Port of San Francisco,

Appellee.

BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANT.

**STATEMENT OF THE PLEADINGS AND FACTS DISCLOS-
ING BASIS OF COURTS' JURISDICTION.**

This is an appeal by the appellant, petitioner below, taken on February 10, 1948 (R. 37) from a final order of the District Court below (R. 36) denying his petition for a discharge from the restraint upon his liberty imposed by the appellee, respondent below, after a hearing had on the writ of habeas corpus issued thereon. The denial was laid on the grounds contained in that Court's opinion (R. 26).

The District Court below had jurisdiction of the proceeding under the provisions of 28 USCA, Secs. 451-453, and this Court has jurisdiction to review its

decision under the provisions of 28 USCA, Secs. 463(a) and 225(a) First.

The pleadings necessary to show the existence of the jurisdictions are the petition for the writ (R. 2), the writ (R. 20), return thereto (R. 21), the traverse (R. 23), order denying the petition (R. 37), opinion of the District Court (R. 26) and the notices of appeal (R. 37).

STATEMENT OF THE CASE.

Lee Fong Fook, the appellant, is an adult native-born citizen of the State of California and of the United States. He is a resident of San Francisco and a person of Chinese lineage. He is a veteran of the recent war and a recipient of an honorable discharge from the Army which was awarded him by the government in acknowledgement of its gratitude for the faithful services he performed for the country.

After the cessation of hostilities he visited China and subsequently returned to San Francisco accompanied by his Chinese bride. Arriving at the Golden Gate they were confronted by the U. S. Immigration and Naturalization Service which forbade their entry into the American Garden of Eden. The denial, however, was not made upon an accusation they had partaken of the forbidden fruit of the garden. It was made for what the immigration authorities were pleased to view as a sin committed by the State of California. Having exhibited this unnatural kindness to the citizen veteran and his bride the Immigration authorities seized them, cast them into jail, held them

incommunicado, deprived them of access to counsel and refused to enlarge them on bond.

Thereafter the Immigration Service subjected him to an administrative examination at which he was represented by counsel of his own choosing. At that hearing the appellant produced duly certified copies of the judgment of the California Superior Court in San Francisco establishing the fact that he was born in California (R. 42), the birth certificate that had issued thereon (R. 41) and his honorable discharge from the Army (R. 43). The authenticity of these documents was admitted. The Immigration examiner, however, attached trifling importance to what is judicially regarded as evidence of an indisputable nature. He viewed these documents as disputable evidence of appellant's citizenship and denied that judgment efficacy on the issue of his citizenship. This was a peculiar way for the government to honor a veteran. It was a peculiar way for the government to treat a citizen.

His protestations being ignored the appellant applied to the District Court below for a writ of habeas corpus to secure liberation from the restraint imposed upon his liberty. There being no disputed factual issues to be decided a hearing thereon was dispensed with and the legal issues were resolved against him for the reasons set forth in the District Court's opinion. Although he was granted temporary release from detention for the purpose of enabling him to prosecute an appeal to a conclusion an unconditional discharge from custody was refused and his petition was denied. From that denial this appeal was initiated.

QUESTION INVOLVED.

When the authenticity of a final judgment of a California Court establishing the fact of appellant's birth in California is admitted, which *ipso facto* demonstrates him to be a citizen of the sovereign State of California and also of the United States, can that judgment be subjected to a collateral attack by the U. S. Immigration and Naturalization Service in an administrative proceeding?

ARGUMENT.

I.

CALIFORNIA IS SOVEREIGN IN ITS DOMAIN AND LEGAL SPHERE.

Historical Background.

When the Spanish explorer Cabrillo and his companions visited the Santa Barbara region in 1542 the Pacific littoral was inhabited by Mongolian descended peoples who had an advanced culture of their own. The Spaniards thought they had discovered a new land. The section of the continent, however, was in its regular place and had been so for some millions of years. The Indian natives whom they encountered had descended from Chinese stock that had inhabited it for several thousand years. The Indians welcomed them and the adventurers, missionaries and migrants who later followed in their footsteps and settled the region. It didn't occur to them to raise the bar of an immigration rule against the intruders. Such a concept was as alien to them as the absence of such a

bar would be to the occidental occupants of the area today whose right thereto rests on a foundation of conquest.

Thereupon the geographical division now known as California became subject to Spanish suzerainty by the traditional method of appropriation of the land and the exclusion of the Indians. In 1824 Mexico threw off the Spanish yoke and California passed to the rule of the Mexican Republic. The inhabitants thereupon became subjects and citizens of Mexico under the Spanish civil law.

On June 14, 1846, Fremont and his companions, raised the Bear Flag and on July 4, 1846, while presuming to represent the will of the inhabitants, proclaimed the independence of California. The white population was not consulted and the Indians were ignored in the matter. In the absence of organized armed resistance they seized the police power of the area by a display of force. On the ascendancy of the new regime the inhabitants, save the Indians who still were viewed as chattels and Mexicans who continued to give allegiance to Mexico, became citizens of the new Republic by virtue of their residence in the area.

On August 15, 1846, it appears that California was declared to be and was recognized as a Territory of the United States. See *New Intern. Encyclopedia*, Vol. IV, p. 343. Captain Stockton's proclamation so declaring is dated August 17, 1846. See H. Ex. Doc. No. 4, pp. 669-670, 29th Congress, 2nd Session; Bancroft's *History of California*, Vol. XXII, pp. 283, 284.

Behind the whole movement for forcing the short-lived independence upon its inhabitants there lurked, concealed from a majority of its inhabitants, the U. S. Government's policy of aggrandizement Fremont was almost rewarded with the presidency of the United States for his part in this political affair. When California became a territory of the Union the United States accepted the political status of its inhabitants as citizens of California and accorded them the rights of territorial citizenship.

How National and State citizenship arose.

The Treaty of Guadalupe Hidalgo fixing the boundaries between Mexico and the United States was entered into on February 2, 1848, and proclaimed on July 4, 1848. See 9 Stat. at Large 922. Article VIII thereof enabled Mexican citizens of California to acquire U. S. citizenship by a simple expression of preference. Those who failed to express a preference for U. S. or Mexican citizenship within one year were deemed to have elected to become U. S. citizens. The residents of California who elected U. S. citizenship and those who did not elect Mexican citizenship within that time thereupon automatically became U. S. citizens without further formality. Legality attaches to this method of adopting foreigners as citizens. See *Boyd v. Nebraska*, 143 U.S. 135, 175-176.

On November 13, 1849, a convention of delegates drafted and adopted the California Constitution of 1849. This was necessary because Art. IV, sec. 4, of the federal Constitution guarantees each State a republican form of government on its admission to the

Union. At the time California recognized as its citizens its inhabitants and voters, the latter being those white adult male resident citizens of the United States and those of Mexico who elected to become U. S. citizens or were blanketed in as such under the Treaty of Guadalupe Hidalgo. See Art. II, sec. 1, Const. of 1849. In Art. XI, sec. 2, of that Constitution the existence of a class of citizens is admitted and, although it did not define State citizenship with precision, it acknowledged and treated them as its own citizens in accordance with the *jus soli* pursuant to Anglo-American concepts of jurisprudence. Thereafter, on September 9, 1850, California was admitted as a State into the Union. See 9 Stat. at Large, 452, Chap. 50.

The constitutional guaranties of National and State citizenship.

Ratification of the first ten Amendments of the U.S. Constitution which had been approved by Congress on September 25, 1789, was completed on December 15, 1791. These amendments are limitations on federal power. By a joint resolution of the House and Senate on July 21, 1868, the 14th Amendment which had passed Congress on June 13, 1866, and had been ratified on July 9, 1868, was declared to be a part of the Constitution. As early as 1829, however, it was recognized that a U. S. citizen was also a citizen of the State where he resided. See *Gassies v. Ballon*, 6 Pet. (31 U.S.) 761. The converse also seems to have been true for Mr. Justice Curtis' dissent in the *Dred Scott* decision, 60 U.S. 393 at 576, asserts that "every person born on the soil of a State, who is a citizen

of that State by force of its Constitution or laws, is also a citizen of the United States''. Both decisions doubtlessly were based upon the *jus soli* concept derived from the common law of England.

The 14th Amendment guaranteed national citizenship to the native-born and to the naturalized. It didn't grant State citizenship to them for that already had been conferred by the respective States. However, it guaranteed State citizenship to the native born and naturalized persons who were State residents. In consequence, it is a restriction on the power of the States to deny State or Federal citizenship to the native born and naturalized residents.

In 1872 California defined State citizenship with precision, thereby putting into writing what long had been the accepted practice in determining its citizens. It enacted Section 51 of the California Political Code which declares the citizens of the State to be:

“1. All persons born in this State and residing within it, except the children of transient aliens and of alien public ministers and consuls;

2. All persons born out of this State who are citizens of the United States and residing within this State.”

In 1879 California adopted its second Constitution.

At the time the U. S. Constitution was adopted in 1787 all residents of the several States, with the probable exception of Indians, slaves regarded as articles of merchandise and aliens refusing allegiance, were considered to be citizens of the United States.

This was not because they were born on American soil for a great many had not been. It was because they were residents of the several States and, therefore, they were the “people” of the new nation. Although the Constitution mentions “citizens of the United States” (Art. I, sec. 3); “a natural born Citizen, or a Citizen of the United States” (Art. II); “Citizens of another State” and “Citizens of the same State” (Art. III, sec. 2); “Citizens of each State” and “Citizens in the several States” (Art. IV) and “Citizens of another State” (11th Amend.), it does not define any of these terms. The “people of the U.S.” and “citizens” were synonymous terms. See *Dred Scott v. Sandford*, 19 How. (60 U.S.) 393, 404, 15 L.Ed. 691, 700. Congress had not defined U. S. citizenship either. National citizenship, in fact, then was determined by the individual’s State residence. Each resident of a State at that time was deemed to be a U. S. citizen. See *Minor v. Happersett*, 88 U.S. 21, Wall. 162, 167, declaring:

“Whoever, then, was one of the people of either of these states when the Constitution of the United States was adopted, became ipso facto a citizen—a member of the nation created by its adoption. He was one of the persons associating together to form the nation, and was, consequently, one of its original citizens. As to this there has never been a doubt. Disputes have arisen as to whether or not certain persons or classes of persons were part of the people at the time, but never as to their citizenship if they were.”

Citizenship by naturalization, although referred to in the Constitution, did not spring into existence until 1790 when Congress enacted the first naturalization statute of March 26, 1790. See 1 Stat. 103. It, too, was made dependent upon residence in this country.

Anticipating the adoption of the 14th Amendment Congress declared persons born in the United States to be citizens of the United States. See 8 USCA, Sec. 1, from the Act of April 9, 1866, 14 Stat. 27, now 8 USCA, Sec. 601a. However, until 1868 when the 14th Amendment became a part of the Constitution there was no constitutional provision defining U. S. citizenship by birth. See *Dred Scott v. Sandford*, supra. Similarly, until the 15th Amendment was adopted the right of a citizen of the United States to vote for Federal or State officers was not defined. Citizens of the United States could not vote for Federal or State officers unless the laws of the States where they resided so provided. See Art. I, secs. 2 and 4, U. S. Constitution. The qualifications for electors were determined by the respective States and varied in those States. The practice and right of the States to determine those qualifications and hence the right to vote for Federal and State officers was recognized by the United States before the 15th Amendment was adopted which guaranteed suffrage against encroachment by the United States and the States. Since then the suffrage qualification practice and laws of the States has continued to be recognized by the United States despite the fact that the right of United States citizens to vote for Federal officers would seem

to be an inherent right free from qualification restriction by the States. The recognition has been based upon the fact that Congress has not legislated upon the matter or provided the machinery for the election of Federal officers and, therefore, leaves this field open to the States to legislate upon without restrictions except those arising from discrimination on account of race, color, or previous condition of servitude which is prohibited by the 15th Amendment.

In this manner it has come about that inherent Federal rights have been restricted with the full knowledge and consent of the United States for inequalities still exist in the qualification requirements of voters in the various States. The 19th Amendment prohibits discrimination by the Federal and state governments for reason of sex but age, literacy and other qualification tests still may be imposed upon the right to vote by various States. Residents of the District of Columbia, established as the seat of the U. S. Government by Congress in 1790, are incapacitated from voting for Federal officers because of a want of residence in the States and also for want of a congressional statute setting up the machinery for their suffrage rights.

Because the rights of national and State citizenship had been subjected to inequalities and restrictions the nation found it necessary to define national and State citizenship with precision and to guaranty the political status of both. This was done by the 14th Amendment which declares:

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside.”

The Amendment is a limitation on the power of the States because it contains a guaranty against abridgment by the States of the privileges and immunities of national citizenship. Nothing therein contained prohibits the States, however, from determining the State or national citizenship of any persons within their borders. A guaranty raises a secondary right to determine the political status it guarantees. The primary right is lodged in the States. If the guaranty is denied by a State the United States may intervene to preserve the guaranteed right. However, we are not here concerned with a denial by the State of a constitutional guaranty. The State of California has not infringed appellant's national citizenship. The 14th Amendment does not expressly guarantee the appellant's national citizenship against infringement by the United States but it does so by implication for implicit in a guaranty is a prohibition against infringement of the rights it protects. The due process clause of the 5th Amendment, however, safeguards the national citizenship status of the appellant against infringement by the United States for it is an express restriction on Federal power.

II.

FACTS RELATING TO BIRTH ARE DETERMINABLE
BY STATE LAW.

By Section 10600 of the Health and Safety Code enacted in 1939, as amended in 1943, the State of California provides that:

“* * * any person beneficially interested in establishing of record the fact of birth and the time and place of such birth * * * may file with the county clerk a verified petition for an order judicially establishing the fact of, and the time and place of the birth * * * in either of the following courts.

(1) The superior court of the county in which the birth * * * is alleged to have occurred.

(2) The superior court in the county in which the person whose birth * * * it is sought to be established is residing, * * *.”

Under Section 10602 service of a copy of the petition is required to be made upon the district attorney of the county where the petition is filed together with notice of the time and place of the hearing. It authorizes the district attorney to appear at the hearing and to oppose the making of the order.

Under Section 10604 which appeared in the 1939 statute publication of notice of the hearing was required to be made but this section was not re-enacted when the statute was revised in 1943. Its deletion seems to have been decided upon for the following reason. During the war proof of birth and therefore, of citizenship, was a prerequisite to employment in

a majority, if not all, of our national defense industries. The publication requirement of this section evidently was causing an unnecessary delay in the employment in those industries of native born residents who lacked birth certificates because they were born before the State set up bureaus of vital statistics and issued birth certificates or because birth records were lost or destroyed. The delay was hampering our national defense and war efforts. In furtherance of those national purposes the State of California, in 1943, disposed of the publication requirement to speed up the factual determination of the birth of those lacking birth certificates to enable the nation to utilize their services in those industries.

The proceeding is one *in rem* or *quasi in rem* to determine a status of the petitioner. Actual notice is given the State of California by service of process upon and notice of the hearing to the county district attorney. In consequence, an opportunity is given to the State to appear and oppose the petition. In the instant case the district attorney, as the law enforcement agent of the State, was served with process and was given notice of the time and place of the hearing of appellant's petition. He declined to enter an appearance. It is to be assumed that his non-appearance was occasioned by the fact that the investigation he is required to conduct into the facts convinced him of the truth of the recitals of the petition. It was an admission and a concession by the executive department of the State that the appellant was born in California at the time and place alleged in the petition.

The California Superior Court is a Court of competent jurisdiction and of record. It had jurisdiction over the status of the appellant and a right and power, under State statute, to determine the facts relating to his nativity from the evidence adduced in favor of the petition and any that might have been offered against it. The proceeding was not a mere administrative act of issuing a delayed birth certificate which is mere disputable evidence of birth. It was not an *ex-parte* proceeding. It was an *adversary* judicial proceeding. The Court weighed the facts, resolved its findings of fact into a conclusion of law and rendered a formal judgment establishing the fact of appellant's birth in this country from the evidence introduced. The rendition of that judgment was a judicial act. No appeal was taken from that judgment and, as a result, it has become final and conclusive. It no longer is subject to a direct attack upon its validity by an appeal and, because of the absence of a want of jurisdiction which would render it void, it is immune from attack in any suit of any type in the same or any other judicial forum whatever. See *Pico v. Cohn*, 91 Cal. 129, establishing the rule in California and following the Federal rule enunciated in *U. S. v. Throckmorton*, 98 U.S. 61. See also, *Tinn v. U. S. District Attorney*, 148 Cal. 773, where the States applied the rule to a State naturalization judgment, and *The Acorn*, 1 Fed. Cas. No. 29, where the rule was applied by a Federal Court to a State naturalization judgment.

State citizenship is a matter peculiarly to be determined by State law. The sovereign granting it is the State. With that power the Federal Government, its legislative, executive and judicial departments, cannot interfere without invading a domain denied to it. The State of California never has ceded to the United States its right to determine who are and who are not citizens of California. The 14th Amendment declares that a native born person is a citizen of the State wherein he resides and, consequently, guarantees that State citizenship and, at the same time, guarantees national citizenship to such native born person. These guaranties prohibit the several States from denying State and National citizenship. Neither guaranty deprives the States of the right and power to determine the State and National citizenship of persons subject to their jurisdiction.

If a concurrent power were lodged in the United States and the several States to determine the facts of birth and of State and National citizenship the invocation of the power by one of the independent sovereigns and its final decision on such status would preclude the other from independent action thereon if for no other reason than the duplication and multiplicity of lawsuits which would prevent finality to any determination thereon and, in consequence, be contrary to public policy. If Federal Courts are to distrust the judgments of State Courts simply to satisfy the whims of Federal administrative agencies the judicial machinery of the States and State law have lost their efficacy and have been supplanted by Federal caprice.

Federal agencies in California, including the United States District Attorney and the United States Immigration and Naturalization Service, ever have been aware of the existence, purpose and use of the California statute relating to the establishment of the facts of birth. Any of them could have intervened in those State proceedings if they had desired to do so. The fact that they did not do so in appellant's case suggests a willingness on the part of the Federal Government to let the matter be determined by the State Court and to accept and abide by its decision.

Thousands of judgments establishing the fact of birth have been rendered by the California Courts. If finality is not to be declared an attribute of those judgments they will be ignored in their entirety by Federal agencies. In consequence the Federal Courts well might find themselves swamped with the filing of complaints by thousands of plaintiffs seeking relief in the nature of declaratory judgments to determine their national citizenship. It is not inconceivable that the Federal judicial machinery would be retarded if it did not suffer a break down simply because of the multitude of such cases.

III.

A STATE COURT JUDGMENT DETERMINATIVE OF FACTS UNDERLYING FEDERAL RIGHTS WHEN FINAL MAY BE RE-EXAMINED ONLY BY THE U. S. SUPREME COURT.

Only two methods exist whereby a State judgment may be set aside. One is a direct attack by a timely appeal through the medium of the State Appellate

Courts and thence to a review by the United States Supreme Court in the manner provided by 28 USCA, Sec. 344. The other is through the instrumentality of a direct attack in the form of an independent bill in equity to set aside a State judgment that has become final on the ground that it is void for want of jurisdiction in its rendition. Such a suit necessarily would have to be brought in a Court of the State where the final judgment had been rendered for only the State tribunals and the United States Supreme Court, under 28 USCA, Sec. 344, can acquire jurisdiction to entertain or review the facts upon which the final judgment was based. Neither type of attack has been launched against the validity of the State judgment involved herein which established appellant's birth in this country and which, by operation of Section 51 of the California Political Code and the 14th Amendment, placed his State and National citizenship beyond question.

State Courts have jurisdiction and power to determine facts underlying both Federal constitutional and statutory rights. Their determination of the facts upon which their judgments are based cannot be set aside or those judgments be disturbed by Federal District Courts and Circuit Courts of Appeals for want of statutory authorization so to do. They are utterly lacking in any such jurisdiction. See *People v. Bruce* (CCA-9), 129 Fed. 2d 421, 423, cert. den. 317 U.S. 710, deciding they have only that jurisdiction which Congress prescribes. The sole Federal tribunal authorized to re-examine such facts and to render a different judgment is the United States Supreme

Court. See *Powell v. Alabama*, 287 U.S. 45. However, alleged errors of State Courts in cases involving State statutes or State constitutional provisions are not subject to revision even by the United States Supreme Court. *Hebert v. Louisiana*, 272 U.S. 312. The only jurisdiction that Court may exercise to revise State decisions is in cases where "the federal Constitution was contravened". *Powell v. Alabama*, supra, at page 55. The rule was phrased aptly in *Rogers v. Peck*, 199 U. S. 425, in the following words:

"It is only where fundamental rights, especially secured by the Federal Constitution, are invaded, that such interference is warranted."

The proceeding had in the State Court was not one involving an invasion of the appellant's basic constitutional rights either by the State or the Federal government. Neither was it one by him or the State involving an invasion of the province of the Federal government. In nowise whatever was that proceeding one in contravention of the Federal Constitution. On the contrary, it was one which, by operation of law, was in furtherance of State and also Federal purposes. It is the only method provided by Federal or State law whereby the appellant could prove his nativity and, in consequence, his State and National citizenship. Neither the Constitution nor Congress sets up any judicial machinery for determining the facts relating to birth or for determining State or National citizenship and, as a result, the State of California acted entirely within its own lawful powers.

While the above cited cases determine the rule applicable to facts underlying Federal constitutional rights the same rule is applied to findings of fact underlying Federal statutory rights. See *Chicago, M. & St. P. Ry. Co. v. Coogan*, 271 U.S. 472, 474. Even where Congress, by statute, has pre-empted to the Federal government a sphere of jurisdiction which supersedes all State laws upon the subject but authorizes or recognizes the procedural machinery of the State as a proper medium for a determination of a person's rights thereunder the United States Supreme Court will not extend its review of a decision of the highest State tribunal beyond the point of ascertaining whether the evidence exhibited in the record is sufficient, as a matter of law, to sustain the State trial Court's judgment. Beyond this point it has refused to go. See *Chicago, M. & St. P. Ry. Co. v. Coogan*, *supra*, where the Court reviewed a decision of the Minnesota Supreme Court, involving rights asserted under the Federal Employers' Liability Act, under which both Federal and State Courts have concurrent jurisdiction of suits for injuries suffered. See 45 USCA, Sec. 56.

It is apparent, therefore, that no authority is vested in the Immigration Service to disregard the State Court judgment here involved or to re-examine or alter the findings of fact upon which that final judgment was based. It has neither statutory nor constitutional authority to dispute those facts or to deny the efficacy of that judgment establishing the fact of appellant's birth in California from which his State

and National citizenship spring by operation of constitutional and statutory law, viz., Section 51 of the California Political Code and the 14th Amendment. For the reasons and upon the authorities above cited neither the trial Court nor this Court is empowered to disregard that judgment or to deny it efficacy.

IV.

FEDERAL AGENCIES AND COURTS ARE BOUND BY CALIFORNIA LAW.

1. Congress has conceded State power to determine nativity and citizenship status.

Although Congress has prescribed a procedural method whereby a foreign born person may be naturalized it has not prescribed a method whereby the facts relating to the birth of natives may be established and citizenship by birth in this country, be determined. There being no federal judicial procedure set up for such a purpose it is evident that Congress intended the States to determine these matters for themselves without involving the United States Courts in needless litigation. It is apparent, therefore, that the United States impliedly consents to the determination of these facts by the procedural methods adopted by the several States and has sanctioned the practice and those methods by recognizing State sovereignty in the matter and the competency of State judicial tribunals to determine such issues.

Similarly, in Title 8 USCA, Sec. 701, Congress has conferred upon State Courts a power to naturalize

resident aliens. The States may avail themselves of this power or refuse to do so in an exercise of their own discretion. They do not act as agents of the Federal government in naturalization proceedings but as independent sovereigns. See *In re Fordiani*, 120 A. 338, 98 Conn. 435. Congress is not empowered to set up State appellate machinery for a review of State naturalization decrees and has not attempted to do so. An attempt on its part so to do would constitute an unwarranted interference by the Federal government with the sovereignty of the States. However, Congress recognizes that the States, in a separate exercise of their own sovereign powers, have the right to prescribe their own methods of appellate review when they appropriate the power to naturalize which Congress has made available to them. See *Tutun v. U. S.*, 270 U.S. 568, and *In re Bogunovich*, 18 Cal. (2d) 160. It is apparent that the States could deny State appellate review in such cases simply by failing to prescribe a method of appeal. Obviously, a naturalization decree of a State Court which had become final could not be ignored by Federal agencies and Courts. It would not be subject to attack except for jurisdictional reasons and even such an attack would have to be brought in a State Court in the jurisdiction where the attacked judgment had been rendered. Even a decree of naturalization granted in a Federal Court would not be subject to attack in a Federal Court except on the jurisdictional grounds specified in the Nationality Act of 1940, 8 USCA, Sec. 738. It is obvious, however, that a State naturaliza-

tion judgment could not be set aside in a State Court on the grounds provided by that Federal statute because there is no California statute similar to the Federal statute which would confer statutory jurisdiction upon the State Court to entertain such suits.

Congress has no power to deprive the native born of national citizenship for that status is a constitutional status. It is beyond the reach of Congress, the executive and the judiciary. It is doubtful whether expatriates abroad can lose their national citizenship under the expatriation statute, 28 USCA, Sec. 801. If that statute is to be held valid the Courts would be under compulsion to justify such a holding by determining that the government thereunder does not deprive the expatriate of citizenship but that the act of the expatriate constitutes a voluntary repudiation of citizenship by which he raises a procedural barrier against proving his substantive right to citizenship. The substantive right, however, is as fundamental as any part of the Constitution and is the very basis upon which that charter is erected and, in consequence, can no more be destroyed than can the divisions of government.

2. Constitution reserves to States the power to determine nativity and citizenship status.

Under our system of the distribution of powers between the States and the Union all those powers which are not allotted expressly to the Federal government and are not forbidden to the States are powers exercisable only by the States. As a result

whenever the Federal government lays claim to a right to wield a particular power it first must show affirmatively that the power has been vested in it by the Constitution.

Inasmuch as the States have not delegated to the United States their inherent power to determine the nativity status of their residents this power necessarily is lodged exclusively in the respective States or in the people thereof by the explicit reservation of such power contained in the 9th and 10th Amendments of the Federal Constitution. Impliedly, therefore, or by its silence on the matter and the absence of congressional legislation on the subject, Congress recognizes, sanctions and concedes the exclusive jurisdiction of the States in this matter.

3. The California law deciding the issue of birth is decisive on appellant's State and National citizenship and binds Federal Courts.

In the absence of a Federal statute providing a Federal judicial method whereby the facts relating to birth may be established judicially the law of the State of California automatically is invoked within the coordinate Federal district and becomes applicable and controlling on Federal Courts therein by virtue of Title 28 USCA, Sec. 725, which provides as follows:

“The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at com-

mon law, in the courts of the United States, in cases where they apply.”

The rule long has been that, except in matters governed entirely by the Federal Constitution or acts of Congress, the law to be applied in any case is the law of the State, there being “no federal general common law”. See *Erie R. Co. v. Tompkins*, 304 U.S. 64, so deciding and also stating that “whether the law of the State shall be declared by its Legislature in a statute or by its highest Court in a decision is not a matter of Federal concern”. See also, *Peterson v. Chicago G.W.R.Co.* (CCA-8), 138 Fed. (2d) 304, holding that Federal Courts must follow the same substantive rule in such cases that a State Court would have applied and stating the rule to be necessary to prevent the accident of diversity of citizenship from disturbing equal administration of justice in coordinate State and Federal Courts sitting side by side.

The law controlling the instant case was determined by the California Superior Court in accordance with California law and practice. The judgment of that Court establishing the facts of appellant’s birth by an application of California law therefore becomes binding on the Federal Courts in this district and elsewhere under 28 USCA, Sec. 725. In consequence, the decision below was erroneous.

The right to confer State citizenship lies originally and immediately in the States. There is no statute of Congress depriving the States of the right to de-

termine either State or National citizenship. Neither by the Constitution nor by statute has the United States attempted to reserve unto itself the power to determine the facts relating to an individual's birth or to determine State or National citizenship. The 14th Amendment contains a guaranty that the States shall not deprive a native-born resident of either type of citizenship. The intent of the framers of that Amendment doubtlessly was to promote the purposes of the State and not to act in derogation thereof as the Immigration Service and the Court below have done.

V.

THE JUDGMENT OF THE CALIFORNIA COURT IS ENTITLED TO FULL FAITH AND CREDIT.

Inasmuch as the judgment of the California Court establishing the fact of birth is safe from attack upon its finality and conclusiveness in its own forum it could not be subjected to attack in sister States. *Williams v. North Carolina*, 317 U.S. 287, 294. In accordance with principles of comity made applicable by the full faith and credit clause of Art. V, Sec. 1, of the U. S. Constitution the judgment becomes binding and controlling upon proceedings thereafter commenced in a sister State when a certified copy of that judgment is produced therein.

Pursuant to its constitutional authorization Congress implemented the full faith and credit clause by

enacting Title 28 USCA, Sec. 687, which provides, in part, as follows:

“And the said records and judicial proceedings, so substantiated, shall have faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.”

This statute extended the full faith and credit provision of the Constitution to all Federal as well as State Courts. *Davis v. Davis*, 305 U.S. 32; *People v. Bruce* (CCA-9), 129 Fed. (2d) 421, cert. den. 317 U.S. 710. The effect that a State judgment has in a sister State or a Federal Court depends upon and is precisely that which is given it by the State law where it was rendered. See *Board of Com'rs for Buras Levee Dist. v. Cockrell* (CCA-La.), 91 Fed. (2d) 412, 416, cert. den. 302 U. S. 740; *Stoll v. Gottlieb*, 305 U.S. 165, rehearing den. 305 U.S. 675; and the early case of *Mills v. Duryee*, 7 Cranch 481, 485, 3 L.Ed. 411, 413. Under this statute Federal Courts are required to give such a judgment the same full faith and credit that sister States are required to accord and, in consequence, Federal agencies may not deny that faith and credit. The duty to give full force and effect to the Constitution and laws of another State is obligatory. *Smithsonian Institution v. St. John*, 214 U.S. 19, 53 L.Ed. 892, 897. Full faith and credit means that one sovereign accords the judgment of another the same effect that it has in the forum of the sovereign where rendered. See *Williams v. North Carolina*, 317 U.S. 287, overruling *Haddock v. Haddock*. The faith and

credit that must be given is not fragmentary but must be full. *Davis v. Davis*, supra.

For the reason that the judgment establishing appellant's birth automatically demonstrated his State citizenship that citizenship is not a status the United States may abridge. State citizenship is granted by the State in the exercise of its own sovereign power. The only concern the United States has with State citizenship is to enforce the guaranty contained in the 14th Amendment against a denial thereof by a State. This appears to be the sole power the United States may exercise in connection with that status.

The full faith and credit clauses of the Constitution and the statute required the Immigration Service and the Court below to give full faith and credit to the judgment of the State Court. They also required them and this Court to take judicial notice of and give effect to Section 51 of the California Political Code which confers State citizenship upon the appellant. See *U. S. v. Brechtel* (CCA-Ia.), 90 Fed. (2d) 516; *Kaye v. May* (CCA-NJ), 296 Fed. 450. The question of his national citizenship was removed from the field of dispute by operation of the guaranty of national citizenship contained in the 14th Amendment which was invoked when the judgment became final and validated that status from the time of his birth.

VI.

FEDERAL AGENCIES AND COURTS CANNOT DENY THE PRIVILEGES AND IMMUNITIES GUARANTEED EITHER TO CITIZENS OF A STATE OR OF THE NATION.

The appellant demonstrated to the California Court that he was born in this State and that fact was resolved in his favor after a hearing on the merits. That judgment has become final. By operation of law, invoked by Section 51 of the California Political Code, that judgment signified the appellant was a native born citizen of California and *ipso facto* a citizen of the United States by invocation of the 14th Amendment.

As a citizen of the sovereign State of California the appellant is entitled to exercise all the privileges and immunities of that *State citizenship* in each and all of the other States in the Union under the provisions of Art. V, Sec. 2, of the U. S. Constitution which specifically provides, as follows:

“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”

These privileges and immunities, which flow from State law determining State citizenship, are exercisable also within the Federal jurisdiction without discrimination. Among the inherent rights that spring from National citizenship is that of freedom of movement. See concurring opinions in *Edwards v. California*, 314 U.S. 160, at 178, 183, 184, and *Crandall v. Nevada*, 6 Wall. 35, 48-49. Among the inherent rights that spring from State citizenship is freedom of move-

ment safeguarded by the privileges and immunities grant of Art. IV, Sec. 2, of the U. S. Constitution. See the majority opinion in *Dred Scott v. Sandford*, 19 How. (60 U.S.) 393, 422-423, 15 L.Ed. 691, 708, where Taney, C. J., in discussing the power of the States but not of the United States, conceded that the privileges and immunities provision of that Article granted a State citizen a constitutional right of ingress to and egress from all the States. A deprivation of this fundamental right of State citizens by the Immigration Service, a Federal agency, appears to be repugnant to that constitutional provision as well as to the full faith and credit clause.

Although the Immigration Service is authorized to detain the appellant temporarily on his return from a visit abroad (*U. S. v. Sing Tuck*, 194 U.S. 161, 168), it would appear that the detention could not be extended unreasonably and that, upon his production of the certified copy of the judgment of the California Court establishing his birth and, therefore, his State and National citizenship, it was obliged to lift the restraint.

VII.

A JUDGMENT OF A STATE COURT WHICH HAS BECOME FINAL IS NOT DISPUTABLE EVIDENCE BUT IS CONCLUSIVE EVIDENCE OF ITS RECITALS.

In a hearing before an administrative agency as well as in judicial proceedings a certificate of birth issued by a State executive agency would be mere

evidence of the facts relating to birth. It would be evidence of a disputable nature. See *Lee Lung v. U. S.* (CCA-9), 217 Fed. (2d) 48; *Lee Leong v. Patterson*, 186 U.S. 168; and *Lee Choy v. U. S.* (CCA-9), 49 Fed. (2d) 24. However, we are not concerned here with a question of disputable evidence. The dignity of a certified copy of the judgment of a State Court of general jurisdiction, the authenticity of which is admitted, cannot be reduced to the classification of disputable evidence simply because an administrative agency desires to treat it as such. See the early case of *Mills v. Duryee*, 7 Cranch 481, 483, 3 L.Ed. 411, 412-413, asserting the rule of conclusiveness. The Immigration Service is not empowered as a Federal executive agency to launch a collateral attack upon a judgment which is the product of State judicial power. A final judgment is conclusive on the material facts which were in issue. A solemn judgment is something far superior to mere evidence of the facts relating to birth and, if it be viewed as evidence at all, it must be viewed as conclusive and indisputable evidence of the facts it decides. Such a judgment cannot be impeached or ignored by the U.S. Immigration Service. Even in direct attacks upon naturalization judgments, brought by the U. S. for the jurisdictional reasons specified in 8 USCA, Sec. 738, Federal Courts can invalidate those judgments only upon satisfaction of the "clear, unequivocal and convincing evidence" rule announced in *Schneidermann v. U. S.*, 320 U.S. 118, 167-168, and *Baumgartner v. U. S.*, 322 U.S. 665. Even that rule of evi-

dence was ignored by the Immigration Service and the Court below as also was the estoppel effect the appellant's honorable discharge certificate from the Army raised. However, the Immigration Service is not authorized to disregard evidence and to substitute whim in the determination of the rights of persons whom it denies admission and seizes for deportation purposes.

Inasmuch as there were no factual issues in dispute in the Court below, the facts being admitted, the appellant was not required to pursue or exhaust his administrative remedies by appealing to the Board of Immigration Appeals before prosecuting his remedy by habeas corpus proceedings. In *U. S. v. Sing Tuck*, 194 U.S. 161, 169, the Supreme Court stated that the exhaustion of administrative remedies was a condition precedent to the institution of a petition for a writ of habeas corpus where factual issues were in dispute and required determination. The Court declared, however, that the rule was otherwise where questions of law only were involved and pointed out that in *Gonzales v. Williams*, 192 U.S. 1, it recognized the right of a remedy by a petition for the writ without exhausting administrative remedies where questions of law only were involved.

CONCLUSION.

It seems to be a general notion that the presence of friendly aliens is a menace to something indefinable in America. Evidently we have become a nation given to vague fears. We have lost our sense of proportion and have grown humorless if we have reached a state of alarm over their presence and are so quick to mistake an American citizen for an alien simply because his face reveals his Chinese lineage. We ignore legality and abandon our sense of propriety when we seek to exclude a native-born American from the land of his birth simply because of a nebulous suspicion the immigration authorities may entertain of him because they believe that a Chinese face is strange to America and betrays a person of foreign nationality.

For the foregoing reasons we submit that the decision of the Court below was erroneous and should be reversed and the appellant be discharged from the custody of the appellee.

Dated, San Francisco, California,
April 2, 1948.

Respectfully submitted,
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No. 11,860

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

LEE FONG FOOK,

Appellant,

vs.

I. F. WIXON, District Director, Immi-
gration and Naturalization Service,
Port of San Francisco,

Appellee.

BRIEF FOR APPELLEE.

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No. 11,860

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

LEE FONG FOOK,

Appellant,

VS.

I. F. WIXON, District Director, Immi-
gration and Naturalization Service,
Port of San Francisco,

Appellee.

BRIEF FOR APPELLEE.

THE FACTS.

Appellant arrived at the port of San Francisco, California, on August 25, 1947, and applied for admission into the United States as a native-born citizen. At that time he presented United States Passport No. 159067 issued to him by the Department of State before his departure for China. He also presented a certified copy of a decree of the Superior Court of the State of California, in and for the City and County of San Francisco, dated August 14, 1944, purporting to establish the fact that he was born on the 6th day of April 1901 in San Francisco, said decree having been issued under the provisions of the Health and Safety

Code of the State of California. (Sections 10600, et seq.) In addition, appellant presented an honorable discharge from the armed services of the United States covering service therein from September 23, 1942 to February 10, 1943. The certificate of discharge recites that he was born in San Francisco, California, and was 41½ years of age at the time of enlistment.

The examining Immigrant Inspector, not being satisfied clearly and beyond a doubt that appellant was born in the United States as claimed, referred the case to a Board of Special Inquiry in accordance with 8 U.S.C. Section 152. Hearings were thereupon conducted before the Board of Special Inquiry on a number of different days in October and November, 1947, at all of which appellant was represented by counsel of his own choosing.

At the hearings before the Board of Special Inquiry, the appellant testified, as did his wife, whom he had recently married in China, and the witness who had appeared in his behalf in the State Court proceeding to establish the fact of birth.

The testimony before the Board raised an issue as to whether appellant had in fact been born in the United States. On December 1, 1947, the Board of Special Inquiry found that appellant was an alien, a citizen of China, and voted to deny him admission into the United States on the ground that he was an alien immigrant without an immigration visa. (Immigration Act of 1924, Section 13(a), 8 U.S.C. Section 213.)¹

¹8 U.S.C. 213. No immigrant shall be admitted to the United States unless he (1) has an unexpired immigration visa * * *.

Thereafter on December 1, 1947, appellant entered an appeal to the Attorney General. (8 U.S.C. 153.) Appellant did not prosecute this appeal, however, but on December 8, 1947, filed a petition for a writ of habeas corpus in the Court below. In this petition appellant alleged that he was an American citizen by birth, and that the present appellee was unlawfully restraining him of his liberty. For the purpose of inquiring into the cause of the alleged restraint of liberty (28 U.S.C. 452) the Court issued a writ of habeas corpus and directed the present appellee to produce the body of appellant at a date fixed in the writ. Appellee complied with the writ and also filed a return in which the proceedings of the Board of Special Inquiry (Exhibit A) and the evidence there considered were set out. Appellant's counsel filed an affidavit in support of appellant's application for release pending the administrative proceedings before the Immigration authorities, and the cause was submitted upon the petition, the return, and the traverse thereto, counsel's affidavit and briefs to be filed, all of which were before the Court below. (Tr. pp. 27, 28, 29 and Exhibit A, pp. 1, 57, 58, 59.)

The Court below refused to grant unconditional release to appellant, holding that the decree of the State Court was not conclusive on the Government and that appellant was required to exhaust his administrative remedies before invoking a review by the Courts of the administrative proceedings and decision. The Court, however, did order appellant's release pending final decision in the administrative proceedings, upon his filing a bond in the sum of \$1000.00.

THE QUESTION.

The basic question presented in this case is whether or not an order of the Superior Court of the State of California, in and for the City and County of San Francisco, purporting to establish the place of birth of the appellant (Sections 10600 et seq. Health and Safety Code of the State of California) is conclusive upon the Immigration authorities of the United States in their administration of the Immigration Acts of February 5, 1917 (8 U.S.C. 132 et seq.) and May 26, 1924 (8 U.S.C. 201 et seq.)

If that decree is binding and conclusive upon the United States, appellant was entitled to unconditional discharge in the Court below. If, on the other hand, that decree is not binding and conclusive on the United States, then appellant obviously must exhaust his administrative remedies before the Courts may examine the administrative decision on habeas corpus.

SUMMARY OF ARGUMENT.

(1) The petition for writ of habeas corpus was premature.

At the time the appellant filed his petition for a writ of habeas corpus in the Court below, he had not exhausted his administrative remedies in that, having given notice of appeal from the decision of the Board of Special Inquiry finding that he was an alien, he failed to perfect his appeal.

The question as to where appellant was born is a question of fact, not a question of law. Questions of

fact are properly determinable by the Board of Special Inquiry.

Even though, as appellant argues, the order of the Superior Court of the State of California, in and for the City and County of San Francisco, dated August 14, 1944, purporting to establish a record of birth of appellant in the State of California, be regarded as *prima facie* evidence of such birth, it is not necessary to make a determination of the matter at this time as the appellant has not exhausted his administrative remedies.

Therefore, the petition for a writ of habeas corpus in the Court below was premature, and was properly denied by the Court.

(2) The Order of the Superior Court of the State of California, in and for the City and County of San Francisco, is not conclusive upon the United States.

The order of the Superior Court of the State of California in and for the City and County of San Francisco, dated August 14, 1944, purporting to establish the record of appellant's birth in the State of California, is not conclusive against the United States, as a federal question is involved, and the United States was not a party to the proceeding in the Superior Court.

ARGUMENT.

(1) THE PETITION FOR A WRIT OF HABEAS CORPUS WAS PREMATURE.

The instant appellant has not yet had his right to enter the United States finally determined by the proper administrative officials. The Courts have uniformly held that they will not interfere in an administrative proceeding until the person seeking relief therefrom has exhausted his administrative remedies and final action has been taken thereon by the proper administrative authorities. In immigration matters, 8 U.S.C. Sections 152 and 153² provide for an appeal from an excluding decision by a Board of Special Inquiry to the Attorney General of the United States.

²8 U.S.C. 152. * * * Every alien who may not appear to the examining immigrant inspector at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry. In the event of rejection by the board of special inquiry, in all cases where an appeal to the Attorney General is permitted by this chapter, the alien shall be so informed and shall have the right to be represented by counsel or other adviser on such appeal.
* * *

8 U.S.C. 153. * * * Boards of special inquiry shall be appointed by either the district director of immigration and naturalization designated by the Commissioner or by the inspector in charge at the various ports of arrival as may be necessary for the prompt determination of all cases of immigrants detained at such ports under the provisions of the law. * * * Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported. * * * In every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of a board of special inquiry adverse to the admission of such alien shall be final, unless reversed on appeal to the Attorney General. * * *

In

Impiriale v. Perkins, Secretary, Department of Labor (decided June 30, 1933, in the Court of Appeals, Dist. of Columbia), 66 Fed. (2d) 805, cert. denied 290 U. S. 690,

the Court said:

“But, since deportation proceedings are administrative and the action of the Secretary of Labor is intended by the statutes to be final, there is no regulatory power in the courts to control the course of such proceedings while pending in that department.

“The jurisdiction of the courts is contingent and usually to be exercised by a writ of habeas corpus ex post facto of an order of deportation.”

While there appears to be no such specific provisions in the Rules of this Court, it is enlightening to note that the New York District Court rules provide as follows:

“RULE XIV(b) Writs shall not be allowed unless the petition shows in exclusion cases that the alien has appealed from an order of exclusion of a Board of Special Inquiry, and that the Secretary of Labor has affirmed the exclusion and ordered the alien deported. * * *”

In

United States ex rel. Loucas v. Commissioner of Immigration (decided D.C. N.Y. May 5, 1931), 49 Fed. (2d) 473,

it is stated:

“That rule (Rule XIV, supra) embodies the normally appropriate attitude of the federal

courts vis-a-vis the executive branch of the government * * *. Ordinarily, it would be insupportable for the courts thus to interfere ad interim with the enforcement of our laws by the appropriate executive department. Administrative redress should always be exhausted before recourse is had to the courts.”

In

United States ex rel. Petersen, et al. v. Comm’r of Immigration (D.C. N.Y.), decided Nov. 11, 1932, 1 Fed. Supp. 735,

the Court said:

“Furthermore, on general principles courts should not interfere with the executive in regard to any matter until the executive has made its final decision, and then only if that decision transcends the scope of executive power by reason of illegality implicit in its nature or in the method of its exercise.” (Citing *Mara v. U. S.* (D.C. N.Y. 12-30-31), 54 Fed. (2d) 397, 399).

See, also,

United States v. Parson, 22 F. Supp. 149,
to the same effect.

That the Courts may not intervene on habeas corpus until the administrative processes of hearing before the local immigration authorities and appeal to the Commissioner have been completed appears to be settled by the case of

United States v. Sing Tuck, 194 U. S. 161, 48
L. Ed. 917,

wherein the Court said:

“* * * it is one of the necessities of the administration of justice that even fundamental questions should be determined in an orderly way.

“* * * before the courts can be called upon, the preliminary sifting process must be gone through with.”

In the brief filed by amicus curiae in support of appellant, it is argued that it is futile for him to exhaust his administrative remedies. (Br. amicus curiae, p. 32.) How can he anticipate, however, what decision might be made on the evidence in this case until acted upon by proper authority? The reviewing authority might, in fact, find him to be a citizen of the United States and entitled to enter this country. His statement that it would be futile to exhaust his administrative remedies is, therefore, a mere conclusion on the part of appellant. In any event, it is apparent that he must exhaust his administrative remedies.

Impiriale v. Perkins, 66 F. (2d) 805, 290 U. S. 690, cert. denied, *supra*.

The question as to where appellant was born is a question of fact. Questions of fact are properly determinable by the tribunal authorized by law to determine the same, in this case the Immigration Board of Special Inquiry. Needless to say, if the appellant was actually born in the State of California, we concede that he would then be a citizen of the United States under the provisions of the Fourteenth Amendment to the United States Constitution. BUT WAS HE ACTUALLY BORN THERE? In considering the evidence to establish the fact of birth, the Board

of Special Inquiry is, in the first instance, the one to determine the question as to whether or not a document presented to it has been fraudulently procured, and, indeed, as in the instant case, where there are earmarks of fraud, it was its duty to inquire into the matter.

In

Lee Lung v. Patterson, 186 U. S. 168, 22 Sup. Ct. 795, 46 L. Ed. 1108,

at page 175, the Supreme Court said :

“But jurisdiction is given to the collector over the right of the alien to land, and necessarily jurisdiction is given to pass on the evidence presented to establish that right. He may determine the validity of the evidence, or receive testimony to controvert it, and we cannot assent to the proposition that an officer or tribunal, invested with jurisdiction of a matter, loses that jurisdiction by not giving sufficient weight to evidence, or by rejecting proper evidence, or by admitting that which is improper.”

In

United States ex rel. Grau v. Uhl, 262 F. 532, the Court said :

“Where, therefore, a question of fact is involved, the statutory remedies and appeals must first be exhausted before this Court will entertain an application for a writ of habeas corpus.

“As the petition shows on its face that petitioner has not taken his appeal to the Secretary of Labor, as provided by Section 17, the application is denied.”

Consider the situation where an applicant admits to the Board of Special Inquiry that he secured his Order Establishing Fact of Birth by fraud upon the Court, and that he actually was born in China, as happened in the cases of *United States v. Chin Siu Hong* (Eddie Lam Chin) prosecuted in the United States District Court, Northern District of California, Southern Division, No. 31,122-H (January 8, 1948) and *Eng Yee* prosecuted in the Superior Court of the State of California in and for the City and County of San Francisco, No. 41,340 (April 20, 1948). Would the Court go so far as to say that the Board of Special Inquiry, under such circumstances, should nevertheless admit the applicant as a citizen of the United States?

(2) **THE ORDER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO IS NOT CONCLUSIVE UPON THE UNITED STATES.**

In analyzing this matter, we have to consider the sovereign power of the United States. It has been fully established that the United States can only be sued by its own consent clearly given by legislative act.

State of North Dakota ex rel. Lemke v. Chicago N. W. Ry. Co., 42 S. Ct. 170, 257 U. S. 485, 66 L. Ed. 329;

Turner v. U. S., 39 S. Ct. 109, 248 U. S. 354, 62 L. Ed. 291 (aff. 51 Ct. Cl. 125);

Stanley v. Schwalby, 16 S. Ct. 754, 162 U. S. 255, 40 L. Ed. 960;

U. S. v. Gleeson, 8 S. Ct. 502, 124 U. S. 255, 31 L. Ed. 421;

U. S. v. Lee, 1 S. Ct. 240, 106 U. S. 196, 26 L. Ed. 171;

Carr v. U. S., 98 U. S. 433, 25 L. Ed. 209;

Hill v. U. S., 9 How. 386, 13 L. Ed. 185;

U. S. v. Clarke, 8 Pet. 436, 8 L. Ed. 1001;

Kelly v. U. S., 59 F. (2d) 743,

and other cases.

The United States does not ordinarily consent to be sued in a State Court.

Stanley v. Schwalby, 16 S. Ct. 754, 162 U. S. 255, 40 L. Ed. 960;

Moon v. Hines, 87 So. 603, 205 Ala. 355, 13 A.L.R. 1020;

Obrecht v. Vinyard, 114 A. 168, 12 Del. Ch. 350;

Petition of Albrecht, 233 N.Y.S. 383, 225 App. Div. 423 (aff. 230 N.Y.S. 543, 132 Misc. 713, and affirmed 171 N. E. 772, 253 N. Y. 537).

It is realized that these cases relate to suits. It would seem, however, by analogy, that the United States can not be made a party to a proceeding in a State Court without its consent. It would also appear that it is permanently established that where a federal question is involved, the Federal Courts administer the national law as established by the Federal Constitution, Treaties and Statutes, regardless of State law.

Prudence Realization Corporation v. Geist (N. Y.), 62 S. Ct. 978, 316 U. S. 89, 86 L. Ed. 1293;

American Surety Co. of N. Y. v. Bethlehem Nat. Bank of Bethlehem (Pa.), 62 S. Ct. 226, 314 U. S. 314, 138 A.L.R. 509, 86 L. Ed. 241;

Deitrick v. Greaney (Mass.), 60 S. Ct. 480, 309 U. S. 190, 84 L. Ed. 694, reversing, CCA 103 F. (2d) 83, modifying D. C.;

Deitrick v. Greaney, 23 F. Supp. 758, cert. granted, 60 S. Ct. 104, 308 U. S. 535, 84 L. Ed. 451, cert. denied *Greaney v. Deitrick*, 60 S. Ct. 104, 308 U. S. 582, 84 L. Ed. 488, rehearing denied *Deitrick v. Greaney*, 60 S. Ct. 611, 309 U. S. 611, 309 U. S. 697, 84 L. Ed. 1036.

It is still the rule, as it has always been, that Federal Courts are not bound by State Court decisions affecting Federal questions:

Garvey v. Wilder (CCA Ill.), 121 F. (2d) 714;
Niagara Hudson Power Corporation v. Hoey (CCA N. Y.), 117 F. (2d) 414, affirming D. C., 34 F. Supp. 302, and cert. denied, 61 S. Ct. 958, 313 U. S. 571, 85 L. Ed. 1529;

Illinois Central R. Co. v. Moore (CCA Miss.), 112 F. (2d) 959, reversing *D. C. Moore v. Illinois Central R. Co.*, 24 F. Supp. 731, cert. denied, 61 S. Ct. 392, 311 U. S. 643, 85 L. Ed. 410, reversed on other grounds, 61 S. Ct. 754, 312 U. S. 630, 85 L. Ed. 1089;

Commercial Credit Co. v. Davidson (CCA Miss.), 112 F. (2d) 54;

Wisdom v. Keen (CCA Miss.), 69 F. (2d) 349;

In re Chicago R. I. and P. Ry. Co. (D. C. Kan.), 28 F. (2d) 56, affirmed CCA.

On many occasions the Federal Courts have refused to enforce the provisions of State Statutes where they obstructed Federal rights.

Commissioners of Sinking Fund of Louisville v. Anderson (D. C. Ky.), 20 F. Supp. 217, affirmed for plaintiff, CCA 110 F. (2d) 961, cert. denied *Commissioners of Sinking Fund of City of Louisville v. Anderson*, 61 S. Ct. 28, 311 U. S. 669, 86 L. Ed. 429;

American Bonding Co. v. Anderson (D. C. Ky.), 20 F. Supp. 217, reversed on other grounds for defendant (CCA), 110 F. (2d) 961.

In the instant case, involving as it does, the question of aliens, it is proper to note that Federal Courts have refused to follow the State law on Federal questions pertaining to aliens.

Ex parte Petterson, 166 Fed. 536 (D. C. Minn.).

This was a deportation case, and the Court stated in arriving at a decision in the matter, that it had taken into consideration Section 721 of the Revised Statutes of the United States (U. S. Compiled Statutes 1901, p. 581; Title 28 USCA Sec. 725), reading as follows:

“The laws of the several states, except where the Constitution, treaties or statutes of the

United States otherwise require or provide, shall be regarded as the rule of decisions in trials at common law, in the courts of the United States, in cases where they apply,”

and the Court goes on to state;

“It has been held by the Supreme Court of the United States that there is nothing in this section which required it to be applied to proceedings in equity or in admiralty, and that it is not applicable in criminal cases cognizable before the United States Courts, *or where the Constitution, treaties, or statutes of the United States require other rules of decision.* *Bucher v. Cheshire R. Co.*, 125 U. S. 583, 8 Sup. Ct. 974, 31 L. Ed. 795; *Clark v. Allen* (D. C.), 114 Fed. 374; *Logan v. U. S.*, 144 U. S. 300, 12 Sup. Ct. 617, 36 L. Ed. 429.” (Italics supplied.)

In

United States v. Candelaria, et al., 271 U. S. 432,

the Supreme Court of the United States said, in substance, that the United States is not bound by a judgment in a State Court where a federal question is involved and the United States is not a party thereto.

Bowling and Miami Improvement Co. v. U. S., 233 U. S. 528, 534;

Privett v. U. S., 256 U. S. 201, 204;

Sunderland v. U. S., 266 U. S. 226, 232.

The United States is not bound by a proceeding in a State Court involving a federal question where it

was not a party to the proceeding and had no notice thereof.

U. S. v. Candelaria, et al., supra;

U. S. v. Moser, 266 U. S. 236;

Bowling v. U. S., 256 U. S. 201;

Sunderland v. U. S., 266 U. S. 226.

The service of notice of the proceeding upon the District Attorney for the City and County of San Francisco, California, was not upon the United States as it is obvious that he does not represent the United States, but solely the City and County of San Francisco, State of California.

In

Economy Light & Power Co. v. U. S., 256 U. S.

113, at p. 123, 65 L. Ed. 847,

the Court stated:

“Our attention is called to the fact that in *People ex rel v. Economy Light & Power Co.*, 241 Ill. 290, pp. 320 to 338, 89 N. E. 760, the Supreme Court of Illinois held that the Des Plaines in its natural condition is not a navigable stream; and it is intimated that we ought to follow that decision. A writ of error brought to review it was dismissed by us because *no federal question was involved*. (234 U. S. 497, 510, 524; 58 L. Ed. 1428, 1434, 1439; 34 S. Ct. 973.) Of course the decision does not render the matter *res judicata* as the United States was not a party. The District Court in the present case treated it as not persuasive, because it appeared that evidence was wanting which is present here; and it cannot be said that the Court below erred in not following it.” (Italics supplied.)

In

Lorber v. Vista Irrigation District, 137 F. (2d) 628,

where the Reconstruction Finance Corporation was a party neither to proceedings in State Court by Bondholders of Irrigation District, to compel levy of assessments and payment of accrued interest on bonds, nor to proceeding in bankruptcy for composition of district's debts, no question of *res judicata* based on State Court proceeding could arise against the Reconstruction Finance Corporation in a proceeding in bankruptcy.

It is interesting to note the following statements in the majority opinion in the case of

Dred Scott v. John F. A. Sandford, 60 U. S. 393, 15 L. Ed. 691, 10 How. 393-633,

“In discussing this question, we must not confound the rights of citizenship which a state may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States.” (p. 700.)

“Consequently, no State, since the adoption of the Constitution, can, by naturalizing an alien, invest him with the rights and privileges secured to a citizen of a State under the federal government, although, so far as the State alone was concerned, he would undoubtedly be entitled to the rights of a citizen, and clothed with all the rights and immunities which the Constitution and the laws of the State attached to that character.

“It is very clear, therefore, that no State can by any Act or law of its own, passed since the adoption of the Constitution, introduce a new member into the political community created by the Constitution of the United States. It cannot make him a member of this community by making him a member of its own. And for the same reason it cannot introduce any person, or description of persons, who were not intended to be embraced in this new political family, which the Constitution brought into existence, but were intended to be excluded from it.” (p. 701.)

In the concurring opinion of the Honorable Justice Grier, it was stated:

“If the rights and immunities connected with or practiced under the institutions of the United States can by any indirection be claimed, or deduced from sources or modes other than the Constitution and laws of the United States, it follows that the power of naturalization vested in Congress is not exclusive—that it has in effect no existence, but is repealed or abrogated.” (p. 732.)

And reading from the dissenting opinion of the Honorable Justice McClean in the same case, it is stated:

“In *Chirac v. Chirac*, 2 Wheat., 261 (15 U. S.) this Court says: ‘That the power of naturalization is exclusively in Congress, does not seem to be, and certainly ought not to be, controverted.’ No person can legally be made a citizen of a State, and consequently a citizen of the United States, of foreign birth, unless he be naturalized under the Acts of Congress. Congress has power ‘to establish a uniform rule of naturalization’.

“It is a power which belongs exclusively to Congress, as intimately connected with our federal relations. A state may authorize foreigners to hold real estate within its jurisdiction, but it has no power to naturalize foreigners, and give them the rights of citizens. Such a right is opposed to the Acts of Congress on the subject of naturalization, and subversive of the federal powers. I regret that any countenance should be given from this bench to a practice like this in some of the States, which has no warrant in the Constitution.” (p. 754.)

The authority of the United States to enforce the powers delegated to it by the respective States can not be impaired by any action without its consent.

Bowling and Miami Improvement Co. v. U. S.,
233 U. S. 528, p. 534;

Privett v. U. S., 256 U. S. 201, 204;

Sunderland v. U. S., 266 U. S. 226, 232.

Black on Judgments (Sec. 792) has this to say on Judgments *Quasi in Rem*:

“Much of the uncertainty and confusion in the definitions of proceedings in rem has arisen from the attempt to make that term cover various classes of actions which are not strictly and purely in rem, although they exhibit some points of analogy or resemblance to the proceedings which fall within the narrower use of the phrase. It is better to distinguish between proceedings in rem and proceedings quasi in rem. The latter are assimilated to the former in some particulars,—as, in respect to the manner of acquiring jurisdic-

tion—but are not always attended by the same consequences—in respect, for example, to the persons bound by the adjudication. To make this more plain, we extract the following description of the two classes from a well considered opinion of the United States Supreme Court: ‘Actions in rem, strictly considered, are proceedings against property only, treated as responsible for the claims asserted by the libelants or plaintiffs. The property itself is in such actions with the defendant, and, except in cases arising during the war, for its hostile character, its forfeiture or sale is sought for the wrong in the commission of which it has been the instrument, or for debts or obligations for which by operation of law it is liable. The Court acquires jurisdiction over the property in such cases by its seizure, and of the subsequent proceedings by public citation to the world, of which the owner is at liberty to avail himself by appearing as a claimant in the case. There is, however, a large class of cases which are not strictly actions in rem, but are frequently spoken of as actions quasi in rem, because, though brought against persons, they only seek to subject certain property of those persons to the discharge of the claims asserted. * * * But they differ, among other things, from actions which are strictly in rem, in that the interest of the defendant is alone sought to be affected, that citation to him is required, and that judgment therein is only conclusive between the parties.’”

Freeman v. Alderson, 119 U. S. 187, 7 Sup Ct. 165, 30 L. Ed. 373 (Black on Judgments, Vol. II, see pp. 1200-1201).

Further, a judgment *in rem* of a domestic as well as a foreign Court, where jurisdiction over the person of a party has not been obtained, except as to his interest in the property affected by the judgment, is not conclusive or binding upon him by way of estoppel in another action.

Durant v. Abendorth, 97 N. Y. 132;

Toby v. Brown, 11 Ark. 308.

The Courts seem to agree that inquisition of lunacy, especially if retrospective, is not conclusive evidence, though it may be *prima facie* against persons who are not specifically made parties to the proceeding.

Rogers v. Walker, 6 Pa. 373, 47 Am. Dec. 470;

Den ex dem Aver v. Clark, 10 N. J. Law 217,
18 Am. Dec. 417 (citing *Sergeson v. Sealey*,
2 Atk. 412);

Ex parte Barnsley, 3 Atk. 184;

Hall v. Warren, 9 Ves. 603;

Faulder v. Silk, 3 Camp. 126;

Thomasson v. Kercheval, 10 Humph. (Tenn.)
322;

Hughes v. Jones, 116 N.Y. 67, 22 N.E. 446, 5
L.R.A. 637, 15 Am. St. Rep. 386.

State laws and decisions cannot determine for the national Courts what constitute sufficient process of law, sufficient service of process, or sufficient appearance of parties, but they must exercise their independent judgment in deciding these questions, not-

withstanding the full faith and credit provision of the Constitution.

Michigan Trust Co. v. Ferry, 175 Fed. 667; 99 C.C.A. 221, 175 Fed. 681, 99 C. C. A. 235 (reversed on other grounds), 278 U.S. 346, 33 S.Ct. 550, 57 L.Ed. 867.

In the case of

Negro John Davis et al. v. Wood (decided in 1816), 1 Wh. 6, 4 L.Ed. 22,

the Court held that a finding as to a status of slavery in a State Court was not *res judicata* as to persons who were not parties to the action.

It is undoubtedly true, as stated by the Court below, in its opinion, that decisions in naturalization cases are upon an entirely different ground, as Congress has entrusted to the State Courts the power to hear and determine petitions of that nature (54 Stat. 1140, 8 U.S.C. 701). Naturally, in such a case, a decree would be fully binding upon the United States and could only be attacked in the manner provided by Federal Statute (8 U.S.C. 738). (Tr. p. 30.)

It would appear further than an Order of the Superior Court purporting to establish the place of birth of a person may be some evidence of the appellant's birthplace. The Court below in its opinion (Tr. p. 31) has stated the matter succinctly:

“In my opinion the decree of the state court is evidence of petitioner's birthplace but not conclusive proof of his citizenship. The United States has the full right to inquire into the facts upon which American citizenship is claimed, when entry into the United States is sought; and the

burden of proving that citizenship is upon the person seeking entry.³ If this were not so, the doors would be wide open to fraud upon the part of entrants in the claim of citizenship or fraud in obtaining state decrees as to birth.⁴ (Lee Leong v. U.S. 217 Fed. 48; Ex parte Lee, 49 F. (2d) 486.)”

Such an order, however, obviously cannot be *conclusive* upon the United States, and the weight of the order as evidence is a matter to be considered in the first instance by the administrative authorities on appeal from the excluding decision of the Board of Special Inquiry.

Petitioner claims that because of the issuance of the order of the Superior Court in San Francisco, establishing the fact of birth, the Government is bound to concede that he is a citizen of the United States. This law merely provides a method for the making of a delayed registration of birth. (Sections 10600 to 10607, inclusive, Health and Safety Code, State of California.) (See Appendix.) The proceeding was entirely ex parte and the United States was not a party thereto. As previously set forth in this brief, it would appear that the United States cannot be sued without its consent, evidenced by an Act of Congress,

³Upon his attempted entry, petitioner was subject to the immigration laws as if he had never resided in the United States. (*U. S. ex rel. Stapf v. Corsi*, 287 U.S. 129.)

⁴The record here shows that the sole witness for the petitioner in the State Court proceedings to establish birth, there testified to having seen petitioner immediately after he was born in San Francisco in 1901. This same witness later testified before the immigration authorities that he saw petitioner for the first time in 1911 or 1912 when the latter was about three or four years old.

and, obviously, it cannot be bound by a decree obtained in a State Court in an ex parte proceeding of the type here under discussion.

As a matter of fact this very same question was considered by the Honorable A. F. St. Sure, Judge of the United States District Court, in a deportation case tried by the Court below several years ago on appeal from a deportation order entered by the United States Commissioner, viz.: *United States v. Jew Ben On* (No. 26172-S). In that case the defendant produced an order establishing the fact of birth issued by the Superior Court of the State of California in and for the City and County of San Francisco, just as the present appellant has done. The United States offered evidence in an attempt to show that the defendant had not in fact been born in San Francisco as indicated in the decree of the said Superior Court. After full hearing and argument, Judge St. Sure affirmed the order of the U. S. Commissioner that the defendant be deported. Subsequently defendant gave notice of appeal to this Court, but abandoned the same. Unfortunately the Court did not write an opinion in the case.

We can think of no more striking illustration of the soundness of the doctrine that the United States cannot be bound by an order of a State Court obtained in an ex parte proceeding than the situation which was disclosed in the *Jew Ben On* case, and the more recent case of

U. S. v. Chin Siu Hong (Eddie Lam Chin),
No. 31122-H (D.C. N.D. Calif.),

in which the Federal Grand Jury for this district indicted the subject for fraud, false claim of citizenship and perjury in connection with the presentation to the Immigration authorities of an "Order Establishing Fact of Birth" issued by the Superior Court of the State of California, in and for the City and County of San Francisco, similar to the order involved in the instant case, and in which defendant was sentenced to imprisonment for the term of eighteen months in a penitentiary to be designated by the Attorney General of the United States.

The exclusive power to regulate immigration is conferred upon the United States by Article I, Section 9, Clause 1 of the Constitution of the United States. No State statute passed by any sovereign State can, in any way, interfere with the power so granted by Congress. Legislation, similar to Sections 10600 to 10607, inclusive, Health and Safety Code, State of California, cannot directly or indirectly interfere with such power of Congress to regulate immigration when an immigrant presents himself at the port of entry seeking admission into the United States.

In 1911, the Territorial Legislature of Hawaii passed an Act providing for the issuance of Certificates of Hawaiian birth, and permitted the issuance of such certificates by the Secretary of State of Hawaii on proof satisfactory to him of the facts of such birth. (Sec. 196, Ch. 21, Revised Laws of Hawaii, Revision of 1929.) The then Secretary of Labor, John G. Sargeant, presented to the Attorney General, the ques-

tion as to whether or not these Hawaiian birth certificates, not being like contemporaneous records of birth, were of such weight as to prevent immigration officials from detaining the holders of such certificates for the purpose of determining whether they were citizens of the United States or inadmissible as aliens. In his opinion, reported in Vol. 35, *Opinions of the Attorneys General*, at page 71, et seq. he states:

“It is plain, I think, that the presentation of such a certificate to an immigration inspector does not deprive him of the power or absolve him from the duty to determine for himself the right of the person presenting the certificate to enter the United States. Whenever a person seeks to enter the United States, the first question which arises is that of his citizenship, a question of fact. The immigration laws impose upon the officials of your Department the duty of deciding that question, and pending its decision to detain the person. (*U.S. v. Sing Tuck*, 194 U.S. 161.)

A certificate of Hawaiian birth is not like a contemporaneous record of birth. It is merely an expression of the conclusion of the Secretary of Hawaii on a matter submitted to him for decision. The legislature of the Territory of Hawaii has no power to prescribe what effect shall be given by immigration officers of the United States to a finding or opinion of the Secretary of Hawaii in a matter which Congress has left to the decision of the officers of the United States, and it does not appear that the Legislature of Hawaii has attempted to do so. The provision that the certificates shall be *prima facie* evidence of the facts therein stated may control officers and tribunals of the Territory in matters within their

jurisdiction, but does not prescribe a rule of evidence for immigration officers of the United States. That a certificate of this kind, issued by the Secretary of Hawaii, is not controlling upon the officers of your Department was decided by the Circuit Court of Appeals for the Ninth Circuit in *Lee Leong v. United States*, 217 Fed. 48, and that decision should be treated as binding until overruled. So I advise you that persons presenting such certificates may be detained by the Immigration officers for the purpose of determining whether they are citizens or inadmissible aliens, for such certificates are not controlling."

In

Lee Leong v. United States, 217 Fed. 48,

this Court was called upon to decide whether or not a Hawaiian birth certificate precluded the immigration officers from detaining the holder of such a certificate under the provisions of the immigration laws to determine whether or not he was in fact a citizen of the United States or an alien inadmissible to this country. In that case, the petition for the writ, which was filed in the District Court, alleged that the petitioner was born in the Territory of Hawaii January 21, 1888, of Chinese parents there residing; that about four years later he was taken by his parents to China and there remained until February, 1913, when he left for Honolulu; that on February 21, 1912, the Secretary of the Territory of Hawaii, after application and upon due hearing, as provided by law, issued a certificate certifying that the applicant was born in the Hawaiian Islands on or about January 21, 1888. The petition further alleged that the appellant was given but the

semblance of a hearing before the immigration officials to determine whether he should be allowed to land and that said hearing was not a fair and bona fide hearing, but that the proceedings were conducted in an illegal and improper manner, and not in accordance with the Acts of Congress. Upon the hearing, testimony of witnesses was taken and the immigration officers denied the right of appellant to land, and ordered him deported to China. On page 49, this Court said:

“But counsel for the appellant urge that the decision was contrary to law, in that the immigration officers denied to the certificate of birth that consideration which in law it was entitled to receive. The certificate was issued under the Act of the Legislature of Hawaii approved April 17, 1911, which provides in substance that the Secretary of the Territory of Hawaii may, whenever satisfied that any person was born within the Hawaiian Islands, cause to be issued to such person a certificate showing that fact. It provides that the application shall be on sworn petition and accompanied by affidavits of witnesses, and that the Secretary may examine under oath any applicant or persons cognizant of the facts regarding the application, and it further provides that any certificate so issued shall be prima facie evidence of the facts therein stated.

Two grounds may be suggested on which it should be held that there was no error in denying to the certificate a controlling effect on the hearing. *In the first place, no act of the Territory of Hawaii can avail to affect the laws of the United States in regard to the emigration of aliens.* Williams v. United States, 137 U.S. 113,

11 Sup. Ct. 43, 34 L. Ed. 590. In the second place, assuming that the certificate of the secretary of the Territory of Hawaii was, as the law declared it to be, *prima facie* evidence of the facts recited, there is in the record ample evidence to justify the immigration officers in ruling that *prima facie* presumption was overcome. This was the conclusion of the Court below, and we find no error therein. *Lee Lung v. Patterson*, 186 U.S. 168, 22 Sup. Ct. 795, 46 L. Ed. 1108.’’ (Italics supplied.)

In

Lee Lung v. Patterson, *supra*,

the question was raised as to the right of Lee Lung’s family to enter the United States at the Immigration port of entry upon presentation of travel documents issued by the Registrar General of Hongkong pursuant to treaty provisions. At page 175, the Supreme Court said:

“It is urged that the statute makes the certificates evidence, and that the collector had no power to disregard the certificates, and ‘whether he did not consider them at all and did not pass upon their validity or invalidity, as in either view of the case, we respectfully submit the collector is not chargeable merely with error, in which event his decision is not reviewable by the Court, but with the more serious charge of having exceeded his jurisdiction, in which case, we submit, his decision is reviewable.’

“But jurisdiction is given to the collector over the right of the alien to land, and necessarily jurisdiction is given to pass on the evidence presented to establish that right. He may determine the validity of the evidence, or receive testimony

to controvert it, and we cannot assent to the proposition that an officer or tribunal, invested with jurisdiction of a matter, loses that jurisdiction by not giving sufficient weight to evidence, or by rejecting proper evidence, or by admitting that which is improper.”

A birth certificate not filed contemporaneously with the birth of the person named therein, but many years afterwards, is not entitled to be given the weight of a birth certificate executed at the time of birth. The matter of the weight to be given to such a birth certificate was passed upon in

Ex parte Wilson Seen Lee (D.C. Wash.), 49 F. (2d) 468,

by Judge Neterer on October 16, 1930, in which he states:

“The birth certificate filed fourteen or fifteen years after the birth is of no probative value, *Nagle v. Dong Ming* (CCA) 26 F. (2d) 438; and pregnant is this conclusion as to the fact by the statement of the doctor that he had no data from which to register this birth and that no one caused him to register it at that late date, and that he did not know the party registered, nor have any record in his possession to show the birth.”

The failure of the Commissioner of Immigration and the Secretary of Labor to recognize this certificate was upheld by the Court.

Recognizing that Federal Agencies might have occasion to question the United States citizenship of persons claiming same, Congress saw fit to provide under Section 503 of the Nationality Act of 1940

(8 U.S.C.A. 903)⁵ a method whereby a person claiming United States citizenship and whose claimed citizenship was denied by any department, or agency, or executive official thereof, might procure a judicial determination of such citizenship in the United States Court, thus indicating an intention on the part of Congress to reserve to the United States its right to determine the national citizenship of such person.

Congress therefore has provided a judicial method of establishing citizenship by an action brought in a Federal Court; conversely Congress has never consented to bind the United States by any similar proceeding brought in a State Court to which the United States is not a party.

It may be that upon the entire record in this case the appellate administrative authority will decide that appellant's birth in the United States has been established by the evidence. It may also be that should the appellate administrative authority decide otherwise, the Courts on habeas corpus might, upon the whole record, conclude that such a decision was arbitrary. Certainly, however, it cannot be said that the order of the State Court is conclusive. We submit that the Court below was right in its decision, which simply

⁵8 U.S.C.A. 903. "If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person * * * may institute an action * * * in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States."

requires that appellant exhaust the administrative remedies which the statute has provided before attempting to obtain a judicial review of the action of the immigration authorities.

CONCLUSION.

It is beyond controversy that if the appellant was actually born in the United States, he is a citizen of the United States.

Questions of fact, as well as questions of law, in matters of this kind properly come before an Immigration Board of Special Inquiry and before the Attorney General of the United States for their determination. A proceeding to question the legality of their administrative ruling before final action has been taken by the Attorney General of the United States is premature.

The States having delegated to the United States the powers to regulate immigration by Article I, Section 9, Clause 1 of the Constitution of the United States, a federal question arises when a person applies for entry into the United States at a port of entry, and no State can enact legislation which would directly or indirectly restrict the United States in the exercise of the power so granted to it.

Congress, realizing that from time to time questions as to United States citizenship might arise in the

dealings of individuals with Government Agencies and Departments, in Section 503, of the Nationality Act of 1940 (8 U.S.C. 903) has provided a method for securing a declaratory judgment of citizenship in such cases. This was one method whereby appellant might have secured a judicial determination of his claim to United States citizenship.

Another appropriate method would be for appellant to exhaust the administrative remedies which the Immigration statutes have provided and thereafter invoke the review of the Federal Courts on habeas corpus if the final administrative decision were adverse to his claim.

This Honorable Court is not being asked to review or reverse the Order of the Superior Court of the State of California in and for the City and County of San Francisco, dated August 14, 1944, but is asked to make a finding that such order is not binding on the United States because a federal question is involved, and the United States was not a party to the proceeding in which such order was made.

The United States is a sovereign power—it cannot be sued without its consent, and so far as your appellee is advised, no authority has ever been granted by the United States to be made a party to a proceeding such as the one in the instant case. Any state law or proceeding in a state Court where a federal question is involved is not binding on the United States unless it was a party thereto, or consented in some way to be bound thereby.

For the reasons stated, the appellee is therefore of the belief that the opinion of the Court below should be affirmed.

Dated, San Francisco,
June 15, 1948.

Respectfully submitted,

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(Appendix Follows.)

Appendix.

Appendix

Sections 10600 to 10607, inclusive, Health and Safety Code of the State of California, read as follows:

Sec. 10600. Grounds for proceedings: State record lacking. If any birth, death or marriage, occurring in this State:

(a) Was not at the time it occurred required by law to be registered; or

(b) Was not registered in conformity with the provisions of law in effect at the time it occurred by the filing of the proper certificate with the local registrar within a period of one year from the date of the event or if such record has been filed but thereafter lost or destroyed, any person beneficially interested in establishing of record the fact of and the time and place of, such birth, death, or marriage may file with the county clerk a verified petition for an order judicially establishing the fact of, and the time and place of, the birth, death, or marriage in either of the following courts:

(1) The superior court of the county in which the birth, death or marriage is alleged to have occurred.

(2) The superior court of the county in which the person whose birth or marriage it is sought to establish is residing; or, if such person has died, the superior court of the county in which such person was domiciled at the date of death.

Sec. 10600.5. Same: Foreign record lacking. If a person, domiciled in this State, was born or married outside of the State, or, if any person domiciled in

this State at the time of his death, died outside of the State, and the birth, death, or marriage was not registered in the State or country in which it occurred, or a certified copy of the record of the birth, death or marriage is not obtainable, any person beneficially interested in establishing of record the fact of the birth, death or marriage, may petition the superior court of the county in which the person, if a living person, resides, or if the person has died, in the county in which he was domiciled at the date of his death, for an order judicially establishing the fact of the birth, death or marriage.

Sec. 10601. Petition: Verification: Allegations. The petition shall be verified and shall contain all the facts necessary to enable the court to determine the fact of and the time and place of the birth, death or marriage upon the proofs adduced in behalf of the petitioner at the hearing.

Sec. 10602. Same: Service of copy on district attorney. At least five days before the date of the hearing, a copy of the petition shall be served upon the district attorney of the county in which the petition is filed, together with a notice of the time and place of the hearing and he may appear at the hearing and oppose the making of the order.

Sec. 10603. Time for hearing: Place: Continuance. Upon the filing of the petition a hearing shall be fixed by the clerk and at the convenience of the court set at a time not less than 5 nor more than 10 days after the filing of the petition. The hearing may be held in chambers. The court, for good cause, may continue the hearing beyond the 10-day period.

Sec. 10604. Filing fee: Court by which heard. The fee for filing the petition shall be three dollars (\$3) one dollar (\$1) of which shall go to the law library fund of the county. In counties having more than one superior court judge, the petition may be heard by any judge thereof hearing probate matters, or if a probate department has been designated for hearing probate matters, the clerk shall assign the matter to the probate department for hearing.

Sec. 10605. Hearing: Proof: Order. If, upon the hearing, the allegations of the petition are established to the satisfaction of the court, the court may make an order determining that the birth, death, or marriage did in fact occur at the time and place shown by the proofs adduced at the hearing.

Sec. 10606. Form and contents of order. The order shall be made in the form and upon the bank prescribed and furnished by the State registrar and only one birth, death or marriage shall be included in it.

Sec. 10607. Effective date of order: Filing. The order shall become effective upon a filing of a certified copy (a) with the local registrar of vital statistics of the district in which the birth or death occurred, if it occurred in this State, or in the case of marriage with the county recorder. If the event occurred outside the State, the order shall be filed with the registrar of the district or the county recorder of the county, as the case may be, in which the petitioner resides, and (b) with the State Registrar of Vital Statistics.

No. 11,860

IN THE

United States Court of Appeals
For the Ninth Circuit

LEE FONG FOOK,	}
VS.	
I. F. WIXON, District Director, Immi- gration and Naturalization Service, Port of San Francisco,	
	<i>Appellant,</i>
	<i>Appellee.</i>

APPELLANT'S PETITION FOR A REHEARING.

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CLERK

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No. 11,860

IN THE

**United States Court of Appeals
For the Ninth Circuit**

LEE FONG FOOK,

Appellant,

VS.

I. F. WIXON, District Director, Immigration and Naturalization Service,
Port of San Francisco,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable William Denman, Chief Judge, and
to the Honorable Circuit Judges of the United
States Court of Appeals for the Ninth Circuit:*

Lee Fong Fook, appellant, demands a rehearing of his cause on appeal upon the following grounds and for the following reasons:

SOLE QUESTION INVOLVED IS PURE QUESTION OF LAW.

No contention has been made by the appellee that the certified copy of the judgment of the California Superior Court establishing the fact of appellant's birth is a forgery or that the identity of the appellant is not that of the person named in that judgment.

to control the movements of a citizen or to regulate his departure and return to our shores. Nowhere by statute has Congress sought to restrict the departure and return of citizens to our shores. Passports are issued to them simply as a means of identification for use abroad. The Immigration Service usurps legislative authority in restraining a citizen from re-entry to this country upon returning from abroad. See *U. S. v. Wong Kim Ark*, 169 U.S. 649. Even Congress is prohibited from enacting such restrictive legislation for the 9th and 10th Amendments reserve this power to the People or to the respective States. Legislative power over immigrants is lodged in Congress by Art. I, Sec. 9. It is only through the medium of acts of Congress that an executive agency may regulate the entry of foreigners. In consequence, the only authority over a citizen returning from abroad that the Immigration Service may exercise is limited to inspection and temporary detention to ascertain that he is not an immigrant. See *U.S. v. Sing Tuck*, 194 U.S. 161, 168. Unfortunately, the Immigration Service pleads necessity compels it to detain claimants to citizenship for an unreasonable period of time while it endeavors to ascertain whether the person seeking entry is an excludable foreign immigrant. Whatever excuse it may urge for detaining those who are unable to identify themselves no such excuse is acceptable where the claimant presents a certified copy of an admittedly authentic judgment of a State Court of competent jurisdiction proving his native birth and, *ipso facto*, his national citizenship.

The judicial trial to which a claimant to citizenship seeking entry to our shores is entitled and to which this Court's opinion refers, nowhere is provided by Congress. It is a creature of the judiciary and the product of usurped legislative power. The Declaratory Judgment Statute, 28 USCA, Sec. 400, and the Suit to Determine Nationality, 8 USCA, Sec. 903, seem not to be the remedy for the reasons pointed out in our supplemental brief. (The new Declaratory Relief statute, 18 USCA, Sec. 2201, effective Sept. 22, 1948, may yet be interpreted to cover new cases.) The Suit to Determine Nationality may be invoked only when a right of citizenship has been denied. If that remedy applies to citizens at our door and is not restricted to them while abroad, it means simply that the appellant here, when denied entry, could file such a suit. The question, however, is how. The Immigration Service hold incommunicado those seeking admission for weeks and even months while it conducts investigations and its administrative reviews are pending. Nothing in that statute authorizes the applicant to post bond with that Service or to be enlarged on bail by the Court. The Service makes it a practice to deny release on bond to persons it deems excludable.

**PURSUIT AND EXHAUSTION OF ADMINISTRATIVE REMEDIES
UNNECESSARY WHERE QUESTION OF LAW ONLY IS INVOLVED.**

The exhaustion of administrative remedies may be made a condition precedent to the right to maintain

a suit at law or a bill in equity but it is not a condition precedent to the right to apply for a writ of habeas corpus where the issue involved is purely a question of law. See *Gonzales v. William*, 192 U.S. 1, so deciding; *U.S. v. Sing Tuck*, 194 U.S. 161, 169, distinguishing cases involving factual issues from those presenting only issues of law; see also, *U.S. v. Wong Kim Ark*, 169 U.S. 649; *U.S. ex rel. Bradley v. Watkins* (CCA-2), 163 Fed. (2d) 328, 330-1; and also *Whitfield v. Hanges* (CCA-8), 222 Fed. 745, 747, pointing out that the denial of a fair and impartial hearing by an executive agency also presents a question of law which gives rise to relief in habeas corpus.

OPINION ERRS IN LEGISLATING RULE OF EVIDENCE INTO ESSE AND AUTHORIZING DELEGATION OF JUDICIAL FUNCTION TO EXECUTIVE AGENCY.

Wherein is this Court authorized to declare that the trial Court should hold the habeas corpus proceeding in abeyance while it awaits the final decision of the Commissioner and has the benefits of his views on the question of the appellant's claim of citizenship? The significance of this Court's decision is that the trial Court, sitting in habeas corpus, necessarily must attach weight and probably controlling weight to the decision of the Commissioner on this important judicial issue. This is nothing but a method of making a judicial determination dependent upon a spurious manufactured mass of evidence consisting of vague hearsay, opinions and conclusions by a strange pro-

cess of judicial osmosis. It elevates the opinions and conclusions of an executive agency to the dignity of credible evidence to which the judicial tribunal may attach even controlling weight. In effect, this Court's opinion, by usurping legislative power, decides that the judicial function of passing on evidence may be relegated or delegated to the executive agency. This is a method of obviating congressionally created rules of evidence and of substituting whim and caprice as the test of a citizen's right to enter his own country. Thus, administrative agents of the nation, arrogating unto themselves a power not lodged in them, through the instrumentality of the Courts and with the consent of the Courts, are enabled to deprive a citizen of his birthright.

**OPINION ERRONEOUS FOR IMPAIRING WRIT OF
HABEAS CORPUS.**

No right exists in this Court or in the district Court or any other court whatever to emasculate the great writ of habeas corpus. Courts, by judicial interpretation, may expand the rights of an applicant for that writ but no power whatever is lodged in them to lop off any of its incidents. That writ forever (or rather what is termed, forever), is safeguarded by Art. I, Sec. 9, Cl. 2 of the Constitution from interference with its operation by any of the divisions of Government because any interference with its full and complete operation would amount to an impairment or a suspension of the writ. The opinion of this Court com-

manding the Court below to hold the habeas corpus proceeding in abeyance pending its receipt of information on the Commissioner's views on the citizenship of the appellant and his eligibility to admission to the United States does nothing but impair and suspend the writ of habeas corpus and is void for said reasons.

Habeas corpus proceedings need not wait for the Commissioner's views. Title 28 USCA, Sec. 455, now 2243, requires the Court or judge to whom an application for a writ of habeas corpus is pending "forthwith" to award the writ when it states grounds for relief. Sec. 458, now 2243, requires the detainer to bring the body of the restrained person to Court. Sec. 459, now 2243, requires the Court to set a day for the hearing thereon within five (5) days. Sec. 461, now 2243, requires that the Court must proceed summarily to determine the case and dispose of the matter as law and justice require. The opinion of this Court, however, dispenses with the requirements of these sections by commanding the Court below to delay that proceeding, that is to say, to take no judicial action thereon but to hold the proceeding in abeyance until such time as the Immigration Service stops worrying the problem and decides to admit the applicant to this country or informs the Court that it believes the petitioner is an excludable alien or nonresident. This is, therefore, either a command to the Court below to refuse to exercise its statutory duty to hear the cause summarily or a command that its judicial functions, impliedly delegated to the Commissioner, are to be

exercised by the Commissioner. Judicial functions, however, cannot be delegated to executive or legislative bodies or to juries. Compare *U.S. v. L. Cohen Grocery Co.*, 255 U.S. 81; *Field v. Clark*, 143 U.S. 649; *Schechter Poultry Corp. v. U. S.*, 295 U.S. 495.

Although the word “forthright” in Sec. 455 does not signify “instantly” it would be a distortion of its definition and interpretation to say it authorizes the wholly unnecessary delay this Court’s opinion would occasion by ordering the proceeding below to be held in abeyance while the Immigration Service determines what decision it is to make. What the Supreme Court said of a similar delay on hearing on a writ in *Holiday v. Johnston*, 312 U.S. 342, 350, is an appropriate answer, viz., “It is said that the procedure tends to expedite the disposition of habeas corpus cases. The record in this case would seem to contradict the argument.”

Habeas corpus proceedings and decisions thereon need not wait on the pleasure of administrative agencies or the Courts. There are no conditions precedent to the right to apply for the writ and to a special and summary hearing thereon in habeas corpus proceedings where illegal detention is alleged. See Mr. Justice Holmes’ formulation of the rule, long accepted by the Supreme Court, in his opinion in *Frank v. Mangum*, 237 U.S. 309 at 346, 59 L. Ed. 969 at 988, in the following language:

“But habeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the

proceedings, and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell.”

See also, *Price v. Johnston* (1948), 92 L. Ed. 993 at 996, declaring that the writ of habeas corpus should not “lose its effectiveness in a procedural morass” and at page 1002 where it is stated that the purpose of the writ is “to afford a swift and imperative remedy in all cases of alleged restraint upon personal liberty”. Except for the innate goodness of the judge in the Court below in releasing him on bail the appellant still would be deteriorating in detention in the immigration jail. Had he not been able to raise cash bail or to purchase a surety bond he still would be lodged there. Ordering the Court below to suspend hearing and action on the writ cannot be said to afford a swift or imperative remedy for the restraint of liberty continues, even though the petitioner is enlarged on bond or bail, until a discharge is granted.

The Supreme Court, in its necessary capacity as a super-legislative body, does such things by resting its decisions on the law of necessity (as done in its opinion in *Price v. Johnston*, but circuit and district Courts may not invade the legislative field into which the Supreme Court itself trespasses only with the greatest caution.

We do not believe that a citizen must wait for an administrative body to create evidence, consisting of its views, opinions and conclusions, and then transmit it to a judicial tribunal, sitting in habeas corpus,

where it is given evidentiary weight. In that manner the conclusion of an executive agency is substituted for judicial determination of an issue which is purely judicial. The Courts are not empowered to delegate judicial functions to executive agencies.

IMPORTANCE OF DECISION ON MERITS OF ISSUE.

Probably between 100,000 and 300,000 like judgments of the Superior Court of California establishing the fact of birth have been rendered since the statute has been in force and effect. The majority of these seem to have been rendered since 1941. Those judgments have been necessary to enable men and women to have determined the dates and facts of their births to enable them to gain employment, to fix their retirement ages and to prove their eligibility to receive pensions, social security and other benefits for which they labor. A number of our Superior Court judges have obtained like judgments for such purposes and it is likely that a number of our federal judges have done likewise.

It would be strange were this Court to adopt the whimsical view that the Superior Court judges did not know what they were doing when they rendered those judgments and that they did not have jurisdiction to decide the issue involved therein and that those judgments are worthless. If this Court were to deny the binding effect of the appellant's judgment establishing his birth and *ipso facto* his national citizenship its decision, in effect, is tantamount to a nullifi-

cation of the California statute and to a cancellation of all those judgments and is a denial of their efficacy. We do not believe any such power is lodged in our federal Courts.

Of course a citizen is entitled to a judicial hearing on his claim to citizenship when it is disputed by the Immigration Service. He is entitled to apply for a writ of habeas corpus. In such a proceeding the issue is the legality of the detention and, as an incident to that issue, proof of citizenship or of residence is involved. Habeas corpus waits upon no agency. A citizen need not wait upon an executive agency which, after all, is his servant and not his lord. When the servant is presented with a certified copy of an authentic judgment establishing the fact of birth and recognizes and admits its authenticity the authority for temporary detention lodged in the servant disappears. Detention from that moment forth is unlawful.

CONCLUSION.

Although the great liberty writ cuts across all forms of legal red tape this Court, by its opinion and decision herein, retards its speedy relief and, in effect, deprives it of efficacy. This Court has exceeded its power. It omitted passing on the serious issues involved. It is highly unsatisfactory from the viewpoint of the appellant and also from that of the appellee for the question whether the California judgment is final and conclusive is a like issue in many cases pending before the Immigration Service and in many more

cases to arise. It decides nothing and offers no solution to the pressing problem confronting appellant, the Immigration Service and many thousands of citizens who have procured like judgments. Why should a citizen await the whim of an executive agency. Citizens still have some rights left. We do not intend to lay these few precious won rights upon the sacrificial altar of executive caprice. Magna Carta and the Bill of Rights still are sacred to citizens regardless what administrative agents may think of them. We are not willing to yield any of them even to judicial caprice. We are not willing to surrender them to any entity, governmental or private.

We trouble you, therefore, to set aside your order remanding the cause with the instructions therein contained and urge that appellant be granted a rehearing on the serious issues framed in the pleadings, involved in the appeal and stressed herein and in the briefs of both sides.

Dated, San Francisco, California,
November 22, 1948.

Respectfully submitted,
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WAYNE M. COLLINS,
Counsel for Amicus Curiae.

CERTIFICATE OF COUNSEL

The within petition for a rehearing is well founded in point of law and fact and is not interposed for delay.

GUS C. RINGOLE,
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WAYNE M. COLLINS,
Counsel for Amicus Curiae.

